No. 56

In the Supreme Court of the United States

OCTOBER TERM, 1944

SOUTHERN PACIFIC COMPANY, APPELLANT

v.

STATE OF ARIZONA, EX REL. JOE CONWAY, ATTORNEY GENERAL OF THE STATE OF ARIZONA

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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OPINIONS BELOW

The opinion of the Arizona Supreme Court (R. 4055–4071) is reported in 145 Pac. (2d) 530. The unreported opinion of the Arizona Superior Court may be found in the jurisdictional statement (pp. 22–34) and at R. 4042–4054; the findings of fact and conclusions of law of that court may be found at R. 3879–4039.

QUESTIONS PRESENTED

The questions considered in this brief are:

1. Whether Congress has manifested any specific intention as to the validity of state train

length legislation, and in particular whether Section 1, paragraphs 10–17 of the Interstate Commerce Act authorizes the Interstate Commerce Commission to regulate the subject of train lengths and, if so, whether state limitations are valid during the period before the Commission acted.

2. Whether, assuming the absence of any specific federal legislation on the subject, the Arizona statute contravenes the Commerce Clause.

STATUTES INVOLVED

The statutes involved are the Arizona Train Limit Law (Arizona Code Ann. 1939, Sec. 69–119), and the policy section and Section 1 (10)–(17) of the Interstate Commerce Act (49 U. S. C., Sec. 1 (10)–(17), which are printed in the Appendix, *infra*, pp. 90–98).

STATEMENT

On April 19, 1940, the State of Arizona brought suit against the Southern Pacific Co. for statutory penalties for operating two trains, one passenger and one freight, in violation of the law providing that passenger trains shall not consist of more than fourteen cars and freight trains of more than seventeen (R. 1–4). The carrier answered, admitting the violations but contending that the statute violated the commerce clause and the due process clause of the United States Constitution (R. 5–32). The case was tried in the Arizona

Superior Court, sitting without a jury. After a long trial devoted to the constitutional issues, the trial court entered judgment for the defendant railroad. The evidence and findings are discussed in some detail at the appropriate point in the Argument (*infra*, pp. 21–44). They are accurately summarized in the following excerpts from the trial court's opinion.

The court found that (R. 4046) the

> * * * evidence clearly establishes that "long-train" operating practice is the customary and ordinary practice throughout the United States and that improvements in efficiency, economy and safety are an accomplishment and necessary result of the adoption of that practice. This type of operation is unquestionably more economical and efficient than "short-train" operations. Freight train expenses vary inversely with train length. Furthermore, long-train operations permit improved schedules and performance by elimination of short-train interference.

With respect to the effect on commerce, the court stated (R. 4048–4049):

> The record here also amply discloses that the law causes real interference with, and delay to, interstate commerce, practically to the extent that Arizona operations create a bottle-neck. Actually ninety-three percent of the freight traffic and ninety-five of the passenger business of the defendant in Arizona is interstate commerce. Fur-

thermore, the law certainly imposes a great, substantial and wholly unreasonable burden of expense upon this interstate traffic. To hold in this case that interstate commerce was only incidentally or indirectly involved would be less than realistic, for the interference and regulation is *substantial, continuous, direct and unavoidable,* as is pointed out in detail in the findings of fact. What is even more serious from the standpoint of those who seek to uphold the Act is its extra-territorial effect. The challenged law lays hands upon interstate commerce moving over defendant's lines long before it reaches the physical boundaries of Arizona, and continues directly to affect and regulate that commerce long after it has left Arizona. As a practical matter, it nearly controls the length of passenger trains from Los Angeles to El Paso, and of freight trains from Yuma to Lordsburg, the latter point being twenty-three miles East of the State line, and frequently on to El Paso, 171 miles beyond Arizona's boundary.

The court concluded not only that the Arizona statute imposed an unconstitutional burden upon interstate commerce, but also that the "subject of the length of trains in interstate traffic" falls within the field "exclusively reserved to the National Government" (R. 4047),

> * * * for the reason that the subject matter is national in its character, requir-

> ing uniformity of regulation by a single authority. If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. The very purpose of the commerce clause was to insure uniformity of regulation of interstate commerce against conflicting and discriminating state legislation, such as the law in question. The absence of any act of Congress on the subject of train lengths is equal to its declaration that commerce in that matter shall be free.

The court then turned to the State's contention that the statute was a valid exercise of the police power because designed to add to the safety of railroad operations. Basing its finding on accident statistics in Arizona and other states where longer trains were operated, which showed that casualty rates were much higher in Arizona, the court stated with respect to the limitation on passenger trains (R. 4050):

> From the standpoint of the safety of persons and property, slack and slack-action casualties on passenger trains are of no significance whatever.
>
> Long-train method of operation prevails in passenger service all over the United States, except in Arizona, and the statistics demonstrate, from the safety angle, that the fourteen-car limit has no logical or reasonable basis. Furthermore, long pas-

senger-train operations in Arizona are entirely practicable and would result in greater efficiency, economy and safety.

Hence, certainly as applied to passenger-train operations, the challenged law bears no reasonable relation to its claimed object of safety, and instead of promoting that object actually increases many hazards, and creates many others which would not exist if the law were not enforced.

The same conclusion was reached as to freight trains. On this point the court said (R. 4051):

> The frequency of train and train-service accidents, which includes grade-crossing accidents, appears to be directly related to the number of train units operated and that when more train units are run than are necessary to handle a given amount of traffic, the hazard or accidents in the handling of such traffic is correspondingly increased. When one considers that in the year 1938, for instance, that 30.8% or 4,304 more freight trains were operated between Yuma and El Paso than were actually necessary if it had not been for this law, it becomes apparent why the casualty rate is higher in Arizona.
>
> * * * * * *
>
> * * * it appears very definitely that there are more accidents and they occurred more frequently in proportion to trains handled or traffic moved in short-train territory than in long-train territory.

The court then considered the relationship of the length of trains to "slack accidents" as follows (R. 4052–3):

> A certain amount of slack is absolutely necessary to train operations. It cannot be denied that the addition of each car to a train adds just that much more potential slack, which must be effectively handled by the engineer if serious accidents are to be avoided. To the credit of the locomotive engineers of the United States, be it said that they have, with the improved equipment and devices furnished them, manifested greater skill and exercised more care in handling these longer trains with their heavier locomotives to the extent that over a seventeen-year period (1923–1939) only six per cent of the over-all casualties were caused by this type of accident. It must also be remembered that there are many factors besides length of train causing slack-action casualties, such as: grades, speed of train, consist of train and whether loaded or empty. The record shows many severe casualties of this type on short trains. Limiting trains to the Arizona maxima has had no perceptible limiting effect on even that class of accidents, * * *
>
> * * * * *
>
> In determining then whether the law bears any reasonable relation to safety, only the over-all result in casualties of the entire operation should be considered and when thus weighed it is clear that the law

> not only does not increase safety of train operations in Arizona, but that as a matter of cold fact it makes these short-train operations more dangerous.

The court's final conclusion was that the Act was void as in conflict with both the commerce and the due process clauses (R. 4053–4054).

This judgment was reversed by the Arizona Supreme Court, one judge dissenting (R. 4055–4071). The latter court did not overturn any of the facts found by the trial judge, whose findings, under the state rules of civil procedure, were not to be set aside "unless clearly erroneous."[1] Indeed it did not mention the facts or the findings at any point in its opinion. Its reasoning was that the law was passed for the purpose of protecting the safety of railroad employees and the traveling public (R. 4058), that debatable questions as to the reasonableness of legislation were not for it to decide (R. 4059–4067), and that (R. 4063)

> A state is free in the exertion of its police power to enact reasonable measures in the interest of the health, safety and welfare of its people, including employees of railroads, passengers on trains, and others, even though interstate commerce may be incidentally or indirectly involved. * * *

[1] Rule 52 (a) of the Arizona Rules of Civil Procedure is identical with the same rule in the Federal Rules of Civil Procedure.

[2] The above passage is from a quotation from *M.-K.-T. R. Co.* v. *Williamson*, 36 F. Supp. 607 (W. D. Okla.).

There was no analysis of the facts to show the basis for the conclusion, unexpressed but implicit in the opinion, that the law was reasonably related to the public safety and only incidentally or indirectly affected interstate commerce. As to the claim that the Safety Appliance Act and various sections of the Interstate Commerce Act had occupied the field, the court was of the opinion that they had not until the Interstate Commerce Commission acted.

The carrier appealed from this judgment. In noting probable jurisdiction, this Court called the case to the attention of the Solicitor General.

On September 11, 1942, after the decision of the trial court but before that of the Arizona Supreme Court, the Interstate Commerce Commission issued an order suspending state train limit laws for the duration of the war. The history and pertinence of that order are discussed, *infra*, pp. 60–62, 67–89.

SUMMARY OF ARGUMENT

I

1. The Arizona law regulates the length of trains the vast majority of which are in interstate commerce. The effect of such a limitation in a single state is to require trains to be reconstituted when they enter and leave the state. Since this generally cannot be done at the state border, the law in operation controls the length

of trains without as well as within the state. If other states enacted similar laws, prescribing various maximum train limits, as has been proposed and as would be within their power if the Arizona law is valid, the lack of uniformity in itself would impede the flow of commerce throughout the nation.

2. The Arizona statute obstructs commerce inasmuch as it slows down the movement of interstate traffic. This results both from the terminal delays when trains are reconstituted, and from the additional "meets" and "passes" caused by the running of more trains on a single track line. The train limit law also prevents the Arizona railroads from engaging in the method of railroad operations which is prevalent in the United States today. The operation of freight trains of over seventy and passenger of over fourteen cars is a regular practice on the main lines of the railroads, including the Southern Pacific on its lines outside Arizona. The effect of the law is to require 30% more trains to be operated in Arizona than would otherwise be the case. This substantially increases the cost of transportation, as is shown by comparison of Arizona costs with those of comparable lines elsewhere. This is expensive not only to the carriers but to the public which ultimately bears the cost of transportation. The law also has the effect in time of heavy transportation demands, such as the present, of diminishing the total

amount of traffic which can be carried, inasmuch as more locomotives and more manpower are required to haul traffic in short trains than in long ones. Even if the operation of the state law be suspended during such periods, its effect is not undone inasmuch as the absence of adequate sidings and locomotives interferes with the conversion of the road from short to long train operations.

3. The train length limitation cannot be justified as a safety measure. Experience proves that the slack accident casualties at which it is directed are infrequent, averaging five per year in Arizona, that the law has had a negligible effect in preventing them, and that the increase in the number of trains operated increases the number of other types of accidents which vary in proportion to the number of trains run. The accident rates in Arizona under short train operations, even as to the trainmen whom the law was designed to protect, are much higher than in comparable states.

4. In determining whether a state law contravenes the commerce clause this Court has been concerned with whether the subject of regulation requires national uniformity and with the extent of the burden on commerce. In applying these tests the Court has been guided largely by the practical effect of the statute in interfering with commerce, as compared with the local benefits derived from it. Application of these principles to the Arizona Train Limit Law demonstrates that

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it is invalid. A lack of uniformity in regulation of this subject in itself interferes with the flow of commerce. The movement of interstate trains is obstructed and retarded. The carriers are prevented from employing the method of transportation customarily used by railroads throughout the nation, and are compelled to adopt a means more costly to the public. The effect of the law in reducing accidents is too slight, if it exists at all, to outweigh the interference with the national commerce.

II

Congress has not manifested any specific intention one way or the other as to the validity of state train length bills. No conclusion either way can be drawn from the history of the train length bills introduced in Congress but which failed to pass. And although, in our opinion, the Interstate Commerce Commission is empowered by Section 1, paragraphs 10–17 of the Interstate Commerce Act, to regulate train lengths in certain circumstances, this case involves the period before the Commission acted. We do not believe that any inference can be drawn from the federal legislative history that Congress intended Section 1 either to deprive the states of any power over the subject of train lengths which they might otherwise have had or to expand their constitutional authority to matters which under this Court's decisions they could not otherwise reach.

ARGUMENT

Preliminary Analysis

This brief will deal only with two subjects: (1) whether Congress has manifested any specific intention as to the validity of state train length legislation, and in particular whether it has authorized the Interstate Commerce Commission to regulate the subject of train lengths in Section 1, paragraphs 10–17 of the Interstate Commerce Act, and, if so, whether state limitations are valid during the period before the Commission acted, and (2) whether, assuming the absence of any specific federal legislation or action on the subject, the Arizona statute contravenes the Commerce Clause.

The authority of the Commission over the subject is currently being challenged in *Johnston* v. *United States*,[3] now pending before a three-judge district court in Oklahoma. That case involves the Commission's 1942 order suspending train length limitations during the war, which, of course, does not apply to the 1940 operations for which appellant has been penalized here. The ultimate question with which we are concerned, however, is not the authority of the Commission, but the intention of Congress as to the validity of

[3] W. D. Okla., Civil Action 1408. Proceedings in the case have been postponed until the final determination of the instant case by this Court.

state legislation prior to the time the Commission first sought to exercise its authority. As will appear, we have concluded, in the absence of any specific manifestation as to what Congress actually intended, that the car service provisions of the Interstate Commerce Act neither added to nor subtracted from the preexisting constitutional power of the states over the subject of train lengths. Clearly those provisions did not expand the authority of the states over interstate commerce. An argument can be made that if the Interstate Commerce Act authorized the Commission to regulate train lengths, it occupied that field and thereby made it exclusively federal. But we think it unlikely that in fact Congress would have regarded those provisions as in themselves depriving the states of any power over train lengths which they possessed without action by the Commission.

If this analysis is correct, the case turns upon the validity of the state law under the commerce clause, without regard for any specific delegation to the Commission. Accordingly we shall deal with that problem in Point I, and then consider in Point II (pp. 63–89) whether Congress has manifested any specific intention with respect to the validity of state train length legislation.

I

THE ARIZONA TRAIN LIMIT LAW CONTRAVENES THE COMMERCE CLAUSE

A. THE UNDERLYING PRINCIPLES

Since *Gibbons* v. *Ogden,* 9 Wheat. 1, and *Cooley* v. *Board of Port Wardens,* 12 How. 299, it has been established that under the commerce clause some subjects of regulation are within the exclusive power of Congress, and that even in the absence of a showing of congressional intention some types of state laws are invalid. This has not meant that the states were deprived by the commerce clause of their power to enact measures affecting, or even directly regulating, interstate commerce. But at some point, when the national, as distinct from the local, interest in the subject was sufficient, when the practical burden on interstate commerce became sufficiently clear, the Court has always drawn a line beyond which the states could not go.

The test applied in drawing this line has been expressed in various ways. In the first authoritative formulation of the accepted doctrine (*Cooley* v. *Board of Port Wardens, supra*), the Court declared (p. 319):

> Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some impera-

> tively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.
>
> Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.

In some opinions, the doctrine of the *Cooley* case has been thought to have been based on the legislative intention to be implied from the silence of Congress in the particular case. "The failure of Congress to regulate interstate commerce has generally been taken to signify a Congressional purpose to leave undisturbed the authority of the states to make regulations affecting the commerce in matters of peculiarly local concern, but to withhold from them authority to make regulations affecting those phases of it which, because of the need of a national uniformity, demand that their regulation, if any, be prescribed by a single authority." *Graves* v. *O'Keefe,* 306 U. S. 466,

479, n. and cases cited.[4] But whether or not the rule is predicated upon implications from the commerce clause itself or upon the presumed intention of Congress where Congress has been silent, the result is the same.

Many cases, while not abandoning the "necessity for national uniformity" test, have spoken in terms of "direct" or "indirect" burdens on interstate commerce. Although the words "direct" and "indirect" are in themselves of little assistance, the emphasis in the cases adopting this formula has been on the practical interference with commerce produced by the state law. The commerce clause was designed to reach state legislation which "practically obstructs" commerce as well as that which expresses "hostility" toward it. *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202, 209. Consideration is to be given to "all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce * * *." *Di Santo* v. *Pennsylvania,* 273 U. S. 34, 44 (Mr. Justice Stone, dis-

[4] See Dowling, *Interstate Commerce and State Power* (1940), 27 Va. Law Rev. 1, 20; Powell, *The Validity of State Regulation under the Webb-Kenyon Law* (1917), 2 Southern Law Quarterly 112, 3 Selected Essays on Constitutional Law 880, 898 (Association of American Law Schools, 1938); Sholley, *The Negative Implications of the Commerce Clause,* 3 University of Chicago Law Review 556; 3 Selected Essays on Constitutional Law 933 (Association of American Law Schools 1938).

senting). See also *Minnesota Rate Cases*, 230 U. S. 352, 400.

Both of these principles—sometimes separately and sometimes as if they were interrelated—have found recognition in the recent cases. That the commerce clause establishes "the immunity of interstate commerce from the control of the states respecting all those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation must be prescribed by a single authority" was recognized in *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346, 351, *Edwards* v. *California*, 314 U. S. 160, 176, and *Kelly* v. *Washington*, 302 U. S. 1, 14. Local regulation is to be upheld if it does not impair the "uniformity of control of the national commerce in matters of national concern" or "materially obstruct * * * the free flow of commerce which were the principal objects sought to be secured by the Commerce Clause". *California* v. *Thompson*, 313 U. S. 109, 113; *Parker* v. *Brown*, 317 U. S. 341, 363. And *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, 211, emphasizes that "the fate of state legislation" has been determined "by the weight of the circumstances and the practical and experienced judgment in applying these generalities to the particular instances".

Whether a state statute "unduly" burdens interstate commerce is to be determined by bal-

ancing "the interest of the state in the present regulation * * * against the effect of such control on the commerce in the national aspect". *Illinois Nat. Gas Co.* v. *Central Ill. Pub. Serv. Co.*, 314 U. S. 498, 506. In summary, as said by the Court in *Parker* v. *Brown, supra*, at 362:

> * * * When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved.

It has been urged by appellee that these general principles are inapplicable to a law enacted in the interest of safety and health, that as to such matters the states have complete freedom irrespective of the effect upon commerce of the local regulation. Neither reason nor authority supports this contention, as we show at pp. 53–60, *infra*.

B. APPLICATION OF THESE PRINCIPLES

Application of the above principles to the instant case demonstrates, in our opinion, that the Arizona law is invalid. The length of trains in interstate commerce is a subject which in the national interest requires uniformity of regulation, as distinct from a diversity of local controls. And a state law which prevents railroads from

transporting freight and passengers in trains of the length customarily operated throughout the United States unduly interferes with and obstructs the free flow of interstate commerce. The effect of the law as a safety measure, in reducing accidents and casualties, is too slight, if existent at all, to outweigh the interference with the national commerce.

The following discussion of the facts is based in the main on the findings of fact of the trial court (R. 3887–4034). Although many of the findings referred to have been attacked by the appellee, they were not set aside by the State Supreme Court, and are, in our opinion, proved by the evidence to be correct.[5] Indeed many of the

[5] Citations (in folio numbers) to the supporting evidence are at the end of each finding.

This Court is not bound by the findings of a state court in cases involving a federal right. *United Gas Public Service Co.* v. *Texas*, 303 U. S. 123, 143; *Great Northern Ry. Co.* v. *Washington*, 300 U. S. 154, 165–166; *Norris* v. *Alabama*, 294 U. S. 587, 590; *Fiske* v. *Kansas*, 274 U. S. 380, 385–386; *Aetna Life Ins. Co.* v. *Dunken*, 266 U. S. 389, 394. Accordingly, if the decree of the Arizona Supreme Court be regarded as overturning the findings of the trial court, this Court could still look to the evidence to see if the original findings were correct. And although, by the same token, this Court would not be bound by the trial court's findings, they are entitled to the respect normally given the findings of the judge who has heard the testimony. We submit that the opinion of the trial judge (R. 4042–4054), as well as the findings, manifests the painstaking consideration he gave to his factual conclusions in contrast to the failure of the State Supreme Court to refer to the facts at all.

most important of them are either so obvious or so inherently probable as to be subject to judicial notice.

1. *The Subject of Train Lengths is one Requiring National Uniformity*

The predominantly interstate character of railroad operations in the United States is well known to the Court. Relatively few trains carry only goods or persons which remain within a single state. And the proportion of the trains and cars which cross state lines is very great. In Arizona approximately 93 percent of the freight traffic and 95 percent of the passenger were interstate in character. (R. 3897–8.)[6] Indeed, about two-thirds of the freight and almost three-fourths of the passenger traffic crosses Arizona in the course of travel between other states (R. 3898). Although Arizona may be exceptional in this respect, in view of its location and small population, unquestionably railroading is an industry organized and operated on an interstate basis to a greater extent than almost any other.

With railroad operations largely involving the running of trains across state lines, the confusing effect of permitting the various states to establish limitations on train lengths is easy to demonstrate. Trains crossing the country would have to be broken up and reconstituted as they cross the lines

[6] Whether measured by quantity or by revenue.

of states imposing different limitations. Whenever a long train was about to enter a state with a shorter maximum it would have to be broken up. When the train passed into a state with no restriction, or with a higher one, there would be a new rearrangement. The alternative would be that the carrier would be obliged to conform to the shortest limitation of any of the states through which the train passed.

These possibilities of interference with operations through diverse requirements are not merely theoretical. Although the 70-car maximum for freight trains is the one most commonly proposed, the various bills introduced in state legislatures would have established maximum freight train lengths at from 50 to 125 cars and maximum passenger train lengths at from 10 to 18 cars.[7] If these laws had passed, a freight train running from Virginia to Michigan might have proceeded through states with a 75 car maximum (Virginia), a 125 car maximum (West Virginia), a 3000 foot maximum (Ohio), and a 70 car limit (Michigan). A train from Arkansas to Wisconsin might have been subjected to a 50 car maximum (Arkansas), one-half mile (Missouri), 3000 feet (Iowa), one and one-half miles (Minnesota), and 3300 feet

[7] See table listing and summarizing the train limit bills which were introduced in state legislatures but failed of enactment between 1927 and 1937, Hearings before the House Committee on Interstate and Foreign Commerce on S. 69, *Train Lengths*, 75th Cong., 3rd Sess., p. 447.

(Wisconsin). A train running from Nebraska to California might have been subjected to a 60, 75 or 85 maximum in Nebraska, to a limit fixed by a commission in Kansas, to a 65-car limit in Colorado, to a 75-car limit in New Mexico, to a 70-car limit in Arizona, and to a 74-car limit in California. A passenger train might have been limited to 14 cars in New Jersey, 10 in Pennsylvania, and 18 in West Virginia. If we assume, as would have been the fact, that there were also many states which would have had no limitation upon train lengths interspersed along the routes, the confusion in railroad operations which would have resulted from complying with variegated state regulations is even more apparent.

The present situation is simpler than that described above inasmuch as only three of the 164 train-length bills introduced in 36 state legislatures since 1920 have become law,[8] and the en-

[8] In Nevada, Louisiana and Oklahoma; the Arizona law involved in this case was enacted in 1912. Of the remaining bills, 62 were never reported out of committee, four were withdrawn by their authors, 21 were reported unfavorably by legislative committees and nine without recommendation, 22 died on the legislative calendar after preliminary consideration, four passed one house but were not reported out of committee in the second, 29 were defeated by vote on the floor, and one was vetoed. (The above figures do not include nine bills introduced in New Mexico, which did not pass; we have been unable to discover at what stage of the legislative process they were defeated.) The California and Nevada legislatures have memorialized Congress to pass train length legislation. In Appendix D, *infra*, pp. 103–112, we have

forcement of two of these has been enjoined as unconstitutional.[9] At present 70-car laws are enforced only in Arizona and Oklahoma, with a 14-car passenger limit in Arizona. These affect the flow of through traffic to and from the Pacific Coast, as well as through Oklahoma in other directions. The present record, which is concerned,

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listed the references to the above bills and to the legislative journals disclosing their disposition.

In his veto message of April 17, 1935 Governor Merriam of California stated (Cal. Sen. Journ., 51st sess., 1935, p. 1226):

"The chief and compelling objection to Senate Bill No. 24 is found in the fact that it seeks to establish within the borders of California by State law certain practices and regulations which can be effectively and equitably set up only by Federal statutes which shall be applicable not in one or two, but in all of the 48 States.

* * * * * *

"It is proper, however, that you should know that I have become convinced that this proposed law involves certain probable conflicts with the provisions of the Federal Constitution, indicating the likelihood of nullification of the proposed law in the event of a review by the Supreme Court of the United States."

[9] The 70-car laws in Nevada and Louisiana were held unconstitutional and never enforced. *Southern Pacific Co.* v. *Mashburn*, 18 F. Supp. 393 (D. Nev.); *Texas and New Orleans R. Co.* v. *Martin* (No. 428—Eq. E. D. La.), 1936, unreported. The Arizona law was also held unconstitutional in *Atchison, T. & S. F. Ry. Co.* v. *La Prade*, 2 F. Supp. 855 (D. Ariz.), reversed because of the substitution of a new attorney general who refused to threaten to enforce the law, in *Ex Parte La Prade*, 289 U. S. 444. As to the unsuccessful efforts of the carriers in Arizona to obtain the cooperation of the State Attorney General in bringing a test case between the time of the *La Prade* case and the present litigation, see Hearings, *supra*, note 7, pp. 429–446.

of course, only with the Arizona statute, shows that it results in freight trains being broken up and reformed at the California border and in New Mexico some distance from the Arizona line. Frequently it is not feasible to operate a new train from the New Mexico yard nearest to Arizona, with the result that the Arizona limitation governs the flow of traffic as far east as El Paso, Texas. As to passenger traffic, the Arizona law often controls the length of passenger trains all the way from Los Angeles to El Paso. (R. 4049, 3957, 3959.)

The situation in Oklahoma is more complicated, inasmuch as many railroads pass through the state in various directions.[10] The Chicago, R. I. & P. line from Chicago and Kansas City to the West runs through Oklahoma for 60 miles between Kansas and Texas, and the Santa Fe line between Chicago and California crosses Oklahoma for 117 miles between Kansas and Texas. The Kansas City Southern line from Kansas City, Missouri, to Port Arthur, Texas, crosses from Arkansas into Oklahoma and back to Arkansas again after running through Oklahoma for 143 miles. Neither Kansas nor Texas nor any

[10] The Oklahoma picture appears from any railroad map of the United States, and specifically in a map submitted to the Interstate Commerce Commission in *In the Matter of Service Order No. 85*. See the appendix to the brief submitted by the railroads to the Interstate Commerce Commission in that case.

other state through which the traffic passes (except Arizona) restricts train lengths in any way. On the contrary, proposed bills for limiting train lengths failed of passage in many of the adjoining states.[11] The effect of the Oklahoma law, however, is to require through trains to be broken up for the short distance they pass through that state, as well as for substantial distances on either side between

[11] See Appendix D, *infra*, pp. 103–112. The Kansas Public Service Commission, which was vested with power to regulate train lengths, refused to do so on the ground that—

"It is impracticable to direct that trains engaged in interstate commerce should, when arriving at the Kansas state line, divide into two or more portions, each portion to be attached to an engine and caboose and manned with sufficient employees to conduct it as a train across the state. To do so would not be in the interest of economy. * * * The operation of a greater number of trains would perforce increase the hazard to the public at large at grade crossings, and accidents of this character constitute a large per cent of the serious railroad accidents of today.

"The evidence introduced herein does not, by a preponderance thereof, show that accidents to employees, incurred by reason of operation of trains in Kansas, have unduly increased during the past few years solely because of the increase in length of trains. Neither has it been shown that accidents to passengers riding on such long trains have increased. * * *

"Practically all of the trains operated by respondents in Kansas are engaged to some extent in interstate commerce. The commission recognizes that it has no jurisdiction or authority to issue any order that would cast an undue burden upon such commerce."

The above excerpts are taken from the findings of the Commission as reported in *State ex rel. Public Service Commission* v. *Atchison, T. & S. F. Ry. Co.*, 125 Kans. 586, 588–589, 264 Pac. 1056 (1928).

the Oklahoma line and the nearest terminal in the adjacent state at which trains can be assembled.

The above illustrations of the operation of a state train length law show that lack of national uniformity in the regulation of this subject in itself impedes the flow of commerce through the nation.

If one state may regulate the train length, so may all the others, and they need not prescribe the same maximum limitation. If many endeavored to do so, the confusion resulting from the two state laws now in effect would be many times compounded.

The facts recited also show the effect of the state train length limitation upon operations in other states. To a certain extent the state with the lowest limit governs transportation operations in its part of the nation. For the longer trains must be broken up before they reach that state, thus extending the effect of the law at least to the nearest terminal points in adjoining states. And often, as the record shows, it is impracticable to reassemble trains, so that the short train operation is extended over a wider territory.

It thus appears both that the Arizona train limitation statute has its principal impact upon interstate commerce, and that its effect extends far beyond the control of operations within the regulating state. In such circumstances to permit state regulation will lead to the very kind of con-

fusion and interference which the commerce clause was designed to prevent. The advantages to the national interest of national regulation of such a subject are patent.

2. *The Burden on Interstate Commerce*

A. THE OBSTRUCTION TO TRAFFIC

Inasmuch as, where no legal restrictions prevail, through traffic is generally carried in long trains, many freight trains approaching Arizona are longer than seventy cars in length (R. 3915–6). Such trains must be broken up and reconstituted at the terminals when they enter Arizona. The train which is being reduced in length is delayed during this operation (R. 3953–7). The cars which are cut out of the train are delayed even longer, for they must be taken off the main track and stored for later movement until another train comes along or can be made up (*ibid.*). When a train leaves Arizona the converse takes place, except that often it is not feasible to consolidate eastbound trains at Lordsburg, New Mexico, with the result that the short-train operation continues to El Paso (R. 3957). Where the trains are consolidated in order to secure the advantages of long-train operation, cars are delayed until a long train can be made up (*ibid.*). The length of these delays varies from train to train and from car to car so that no definite figure can be given, but the trial court found the time to be substantial. (R. 3953–3956, 3961.)

These terminal delays are not the only time lost. The use of shorter trains results in more trains running in each direction. In single-track operation, which predominates in the West and in Arizona, when a train meets another going in the opposite direction, one must stop on a siding until the other has passed. This occurs also whenever one train must pass another bound in the same direction. The delays due to these "meets" and "passes" increase with the number of trains. Indeed the number of "meets" alone increases in proportion to the square of the number of trains in movement.[12] This, of course, serves to retard operations, the exact amount of the delay depending upon the length of time trains are required to wait on sidings in the particular case. (R. 3958.)

These effects of the Arizona law upon interstate transportation are readily apparent.[13] The record and findings reveal, however, that a train limitation such as Arizona's has an even deeper and more pervasive effect upon railroad operations.

B. THE EFFECT UPON RAILROAD METHODS OF OPERATION

Long-train operation is the standard operating technique of railroads in the United States today.

[12] Thus seven trains of a hundred cars in each direction would have 49 "meets", while 10 trains of 70 cars would have a hundred "meets".

[13] The law not only delays passenger operations in the ways indicated (Ex. 199, R. 3116–3148), but also has caused the Southern Pacific to cut out passenger cars and crowd the

This does not mean, of course, that all trains are over seventy cars in length. Judging by number, which includes local and branch line trains, most are not. But freight trains ranging from 125 to 160 cars are regularly operated, and the standard length of through freight trains on some systems is over 100 cars and on many others over 70. The operation of trains of over 70 cars in length is a regular and daily practice on the main lines of the railroads. (R. 3937–8.) On many railroads passenger trains of over 17 cars are commonly operated (R. 3938). Outside of Arizona the Southern Pacific runs a substantial proportion of long trains. In 1939 on its comparable route for through traffic through Utah and Nevada, from 66 to 85 percent of the freight trains were over 70 cars in length, and over 43 percent of the passenger trains over 14 cars (R. 3916).[14] As to the practice on other railroads, see Ex. 13, 26, 30, 43, 44, 73, 74, 75, 81, 83, 89, 91, 97, 100, 117, 138,

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passengers into fewer cars when entering Arizona (R. 1307–1308). The Santa Fe has found it necessary to limit the consist of its passenger trains between Chicago and Los Angeles to 14 cars, which handicaps it in competing with lines not so restricted and running longer trains (R. 1049–1053).

[14] The trial court found, and this hardly can be doubted, that conditions on these two lines of the same railroad, both through sparsely-settled western country, were similar and suitable for comparison (R. 3914–5, 3896–7, 3900). Apart from features effected by the Arizona law itself, such as length of sidings and size of locomotives, operations on the two lines were conducted in the same manner.

R. 2861, 2874, 2878, 2894, 2895, 2924–2927, 2933, 2935, 2942, 2944, 2050, 2953, 2977, 3007.

The railroads have adopted the long-train method of operation because it is less costly. Because of the train limit law, the Southern Pacific was required to haul over 30 percent more trains in Arizona than would otherwise have been necessary. (R. 3919, 3963–4.) The record shows a definite relationship between operating expenses and the length of trains (R. 3924–3934).[15]

This additional cost of operation, which for the two Arizona railroads together amounts to about $1,000,000 a year,[16] is of significance not merely because of the expense to them but because of the burden on the public from whom the cost must be recouped. Such an additional cost to those engaged in interstate commerce has always been regarded as a burden upon such commerce in the constitutional sense. Cf. *Colorado v. United States*, 271 U. S. 153, 163.

The burden on commerce imposed by the state law is more than merely financial. More locomotives and more manpower are required to haul traffic in short trains than in long ones. This, together with the congestion at terminals and the delay caused by the statute, diminishes the amount

[15] See particularly Ex. 177, 178, 179, R. 3066–3071.

[16] The trial judge estimated the cost to the Southern Pacific to be approximately $400,000 per year (R. 3966). The annual cost to the Santa Fe was estimated to be $600,000 in the *La Prade* case (2 F. Supp. at 862).

of traffic which can be carried if short trains are used. In times of heavy traffic, where the carriers are strained to haul as large a load as possible, the law thus impedes the amount which can be transported.

And even if the operation of the state law can be suspended in time of emergency, as it eventually was by the Interstate Commerce Commission, the interference with traffic does not disappear, for a railroad line which has not been equipped to handle long trains cannot be easily converted from short to long train operation. As the record shows, because of the train limit law, the sidings in Arizona are long enough only to hold trains of the length which the law permits (R. 3947–8). Engines suitable for the hauling of longer trains were not in service in the state (*ibid*). Even when the statute was suspended, the carrier could operate only with the sidings and locomotives available. The short sidings alone prevent long-train operation in more than one direction at a time.[17] Unless the road is to some extent rebuilt and larger locomotives obtained during the emergency, it can operate long trains only to a limited degree.

This effect of the train limit law upon operations in times of traffic congestion is not merely

[17] During the test period of long-train operations in 1940, the carrier was able to operate long trains only in one direction at a time (R. 3947).

speculative or hypothetical, for that is exactly what has happened since December 1941. The interference with transportation caused by the law was responsible for the order of the Interstate Commerce Commission suspending it (see pp. 67–68, *infra*), but even suspension does not eliminate its harmful effects. Such a statute, which thus impedes commerce at a time when efficient operations are of the most vital importance, conflicts with the national transportation policy to develop a "national transportation system * * * adequate to meet the needs of the commerce of the United States * * * and of the national defense." Interstate Commerce Act, preceding Sec. 1, 54 Stat. 899.

3. *The Effect of the Law as a Safety Measure*

We assume that there can be little doubt that a state statute interfering with interstate commerce in the ways described above would be invalid if it did not purport to be a safety measure.

With respect to the safety character of the law the trial court, after taking extensive testimony, found not only that the Arizona law had no reasonable relation to safety but that it made train operations more dangerous (R. 4050–3, 4021–2). The opinion of the State Supreme Court (R. 4055–68) contains no discussion of the facts upon which the trial court relied, but seems to hold—at most—that the state law has a rational relation-

ship to safety and that if this is so the exercise of legislative judgment must be upheld.

Where the question is whether the national interest in commerce is unduly burdened by a state statute, the test is not whether the state law has a rational relationship, however slight, to safety and health, but whether the local interest in safety is so great as to outweigh the interference with commerce (see pp. 15–19, *supra*, and 53–60, *infra*). When examined from this point of view it seems clear that the state law does not result in sufficient protection to the health and well-being of its citizens, including railroad workmen, to warrant the burden upon commerce. The pertinent facts on this issue are set forth at length in the findings (R. 3974–4032).

In brief they show that although the shock which may result from slack action is undoubtedly greater as the length of a train increases (R. 4052), the number of casualties due to slack action is quite small, averaging about five per year both in Arizona and in Nevada (R. 3991; Ex. 280, R. 3375).[18] Since such accidents result from many

[18] Slack action and its causes are described in detail in the findings at R. 3969–74. The number of slack accident casualties referred to on this and the following pages is based upon casualties resulting from sudden applications of brakes and "sudden stopping, starting, lurch, or jerk * * * not elsewhere provided for" (R. 3990, 1951–1952). Inasmuch as all such sudden stops, etc., are not the consequence of slack action (R. 2159), the number of slack accident casualties given may be too large. It should be noted that the discussion of slack accident casualties relates to freight trains only; as to passenger trains, see pp. 39–40, *infra*.

other causes than the length of the train (R. 4052, 3971), the number attributable to the train being unduly long is necessarily considerably less. A comparison of the number of slack accidents in Arizona and Nevada indicates that with approximately the same amount of traffic (R. 3900), the number was substantially the same under long and short train operations (R. 3991).

The possible effect of a train length law in reducing slack accidents, however, is not the whole story. For there must also be thrown into the scales the effect of the Train Limit Law in *increasing* the number of railroad accidents and casualties generally. If a given amount of traffic is to be carried, the shorter the trains are, the more trains must be run. The result of the Arizona law was to require Southern Pacific to operate 30.8%, or 4,304, more freight trains in 1938 than otherwise would have been necessary (R. 4051, 3964). The record indicates that the frequency of accidents is directly related to the number of trains run (R. 4021–2).

That the number of accidents due to grade crossing collisions between trains and motor vehicles (R. 4013–4), to collisions between trains (R. 4020–4022), and to collisions between trains and pedestrians (R. 4020) will vary in proportion to the number of trains is obvious. Inasmuch as the number of locomotives increases with the number of trains run, accidents due to locomotive failure

will also increase with the number of trains (R. 4020, 4022). In 1939 the number of slack accident casualties in the United States—399—was only 6% of the number of train and train-service casualties to railroad employees—6,713. (Exhibits 262, 266, R. 3300, 3304.) The relative importance from the viewpoint of the public safety of slack accidents and grade crossing accidents alone is shown by the fact that in 1939 in the entire United States there were 399 slack accident casualties, 3 of which were fatal (R. 3979), whereas the average number of grade crossing casualties per year from 1935 to 1939 was 5,718, a large number of which were fatal (R. 4014).[19] And, as we have seen (p. 34, note 18), not all of the so-called slack accident casualties resulted from slack action, and many of those that did would not have been averted if the train had been reduced to the length required by the Arizona law.

In addition, the running of more trains means that there will be more starts and stops of freight trains, more meets and passes, more switching movements. Accidents frequently result from each of these operations (R. 4021–2). The result is that an increase in the number of trains used to carry a given amount of traffic increases the likelihood of injury not only to the men operat-

[19] In 1939 in the United States, 1,398 persons were killed and 3,999 injured in highway grade crossing accidents. (Interstate Commerce Commission, Bureau of Statistics, Accident Bulletin, No. 108, pp. 22–23.)

ing the train[20] but to other railroad employees, passengers, and any of the public likely to be injured by train operations.

The record indicates that this is what has actually occurred. However measured, whether absolutely, proportionally, or by trend, and whether in relation to all railroad casualties or just those affecting the trainmen whom the train limit is supposed to protect, the accident rate in Arizona is much higher than on comparable lines elsewhere. This is shown not only by comparison of Southern Pacific operations in Arizona with those in Nevada,[21] but also by comparing operations of the Southern Pacific and of the

[20] The Train Limit Law is designed to protect the conductors and brakemen at the rear of the train.

[21] During the six-year period 1935–1940, the casualties in Arizona to all employees sustained in train and train-service accidents in road freight train operations were two and one-half times as many as in Nevada (R. 3988), although the total volume of freight traffic was slightly greater in the latter state (R. 3990). The result on a car mile basis, which takes into account the amount of traffic handled, is substantially the same (R. 3989). Although there was a substantial decrease in the accident rate in both states since 1923, the decrease for 1935–1940 over 1923–1928 was 71.1 per cent in Nevada as compared with 52.3 per cent in Arizona (R. 4008). With respect to the freight conductors, brakemen, and flagmen whom the Train Limit Law was designed to protect, the total number of casualties to such employees from all causes, including slack accidents, between 1923 and 1940 was 1.69 times heavier in Arizona—449 to 268 in Nevada. On a car mile basis the casualty rate for 1935–1940 for such employees was 2.2 times as high in Arizona as in Nevada, and the rate of improvement in Arizona after 1923 was also considerably lower. (R. 3989–90.) See Ex. 277–279, R. 3372–3374.

Santa Fe in Arizona with those of the same roads in New Mexico (R. 4001–6).

On a national basis the record and findings show that while the national accident rate per 100,000,000 car miles for all railroad employees (R. 3977; Ex. 262, R. 3300) and for trainmen [22] (R. 3979; Ex. 265, R. 3303) decreased 70 per cent and 66 per cent respectively between 1923–1928 and 1935–1940, the rate for the Southern Pacific in Arizona declined 52.3 and 53.3 per cent (R. 4008). The rate for the Southern Pacific line in Nevada decreased 71.1 per cent and 69.1 per cent, slightly better than the national record (R. 4008).[23] We do not suggest that the difference in train lengths is alone responsible for the greater number and rate of accidents in Arizona.[24] But the growth in Nevada's advantage over Arizona as the disparity in average train length increased, without any other adequate explanation, would seem to indicate that the train length limitation has had the effect of causing accidents instead of preventing them.[25]

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[22] Freight conductors, brakemen, and flagmen.

[23] The decline in slack accidents was 65 per cent nationally (R. 3979; Ex. 266, R. 3304), 57.5 per cent in Nevada (R. 4009; Ex. 280, R. 3375), and 47.7 per cent in Arizona (*ibid.*).

[24] Arizona's rate was higher in 1924, when the average train length in Nevada was slightly less than in Arizona. Cf. Ex. 178, R. 3067 with Exs. 277, 279, R. 3372, 3374.

[25] This is the case even if the years 1923 and 1924 are eliminated from consideration and the comparison begun with 1925. Exs. 277, 279, R. 3372, 3374. In 1924 the Southern Pacific acquired lines in Arizona which appellee has contended makes comparison with the years prior to the acquisition inappropriate.

The Arizona law limits the length of passenger as well as of freight trains. The total number of casualties on passenger trains is almost too small for statistical analysis to be meaningful (R. 4010); a single serious wreck may overbalance the experience of a number of years. Nevertheless, comparison between appellant's lines in Arizona and Nevada (where many long trains are run) shows that passenger casualties are considerably less in the latter state (R. 4010–13; Exs. 291–292, R. 3409–21). With passenger traffic in Nevada 78 percent as heavy as in Arizona, from 1923–1938 239 casualties were caused to persons other than trespassers by passenger trains in Arizona and 109 in Nevada—the latter figure including 53 persons killed or injured in a single wreck apparently caused by external malicious tampering with the track (*ibid.*). Inasmuch as passenger trains are much shorter than freight trains and have superior brakes which set almost simultaneously (R. 2484–5, 2474, 795–6, 2731), the portion of the small number of total casualties attributable to slack action would obviously be minute. The record shows only that between 1923 and 1939 five persons in Nevada and fourteen in Arizona were injured by sudden stops, starts or jerks on passenger trains, none of which in either state exceeded fourteen cars in length (Ex. 291–292, R. 3409–3411, 3414–3421); it does not indicate whether or not any of these accidents resulted from slack action or was affected by the

length of the train.[26] In any event the number of casualties from these causes in each State averaged under one per year, and was much less in the State in which longer trains were operated.

The fact that there are relatively few slack accidents, that their number is just as great under a train limit law, and that they are outweighed in the harm they cause the public by the increase in the accident rate which results from running a greater number of trains than necessary does not mean that steps should not be taken to eliminate them. But more effective remedies are already available to reduce the dangers and difficulties of long train operation without forcing the carriers to abandon it.

Slack accidents are commonly caused in large part by the progressive, rather than the simultaneous, setting of the brakes in a train. Since 1933 as a result of tests previously conducted by the American Railroad Association with the old K type brake and experimental models, a new type of air-brake, the AB brake, has been developed which sets the brakes throughout the train much more evenly.[27] This brake greatly reduces the

[26] Sudden stops or starts or jerks may, of course, occur entirely apart from slack action, as they do on busses or streetcars.

[27] The facts set forth in this paragraph have been obtained from the Bureau of Safety of the Interstate Commerce Commission. They are also disclosed in the testimony of Mr. F. C. MacDonald, of the Bureau of Safety before a subcom-

shock resulting from slack action, and when installed on all equipment should decrease accidents from this cause. All new freight cars since 1933 have been supplied with AB brakes and at the present time about one-half of the freight cars for interchange service are so equipped. On July 29, 1944 the Interstate Commerce Commission ordered the railroads to show cause why all freight cars should not be so equipped by January 1, 1946; the specifications provided for apparatus "based upon * * * train length of 150 cars".[28] A hearing was held on December 19, 1944, at which time the carriers sought an extension of time for installation but did not otherwise oppose the general provisions of the order.[29] On passen-

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mittee of the Senate Committee on Interstate Commerce (Hearings on S. 2625, 73rd Cong., 2d sess., *Limiting the Car Length of Trains*, pp. 156–161), the statement submitted by G. H. Wood, Chairman of the Brake Committee of the American Railroad Association (*id.*, pp. 229–231), and the testimony of E. Von Bergen, of the Illinois Central System before the House Committee on Interstate and Foreign Commerce (Hearings on S. 69, 75th Cong., 3d sess., *Train Lengths*, pp. 1009–1011. See also American Railway Association, *Report of Road Tests with Type AB Freight Brake Equipment* (1933) (mimeographed); R. 991, 1005.

[28] See *Interstate Commerce Commission, Investigation of Power Brakes and Appliances for Operating Power-Brake Systems*, No. 13528, Order of July 29, 1944, printed in full in the appendix to Volume I of the appellant's brief. The Order contains a recital of many of the facts referred to in the text of this brief.

[29] See the notice of hearing and summary of pre-hearing conference, issued by the Interstate Commerce Commission in No. 13528, *supra*, October 19, 1944. At the hearing, the

ger trains brakes even superior to the AB and other devices, such as an improved draft gear in conventional equipment, and the completely integrated train, which has no slack, have largely eliminated the likelihood of injury from slack action. See p. 39, *supra*.

The appellee also has referred to the difficulty of signalling between the engine and the caboose of a long train. The trial court found that only one accident (on a train with 2 cars and a caboose) and no casualties had resulted from inability to observe or interpret signals in Arizona and Nevada during the 18-year period ending in 1940 (R. 4024–5).[30] Moreover, the problem of signalling can also be solved without resorting to a reduction in the length of trains by the installation of radio communication between the front and rear of trains.[31] The Interstate Commerce Commission has already approved an ap-

Brotherhood of Railroad Trainmen objected to the specifications as not sufficiently stringent. Briefs have not as yet been filed, and no final decision has been reached. An additional hearing is to be held on April 17, 1945.

[30] With respect to the inability to see signals, the court found that the only signal given from the rear of the train while it was moving was the stop signal, that if this were missed the conductor could and would stop the train through using the rear brake valve on the caboose, and that in 18 years no reportable casualty had resulted from the use of the valve. While the train is standing still a missed signal to proceed results only in repetition of the signal until the engineer sees it before he starts the train (R. 4023–5).

[31] The feasibility of radio communication for the railroads is disclosed in the Hearings before the Kilgore Subcommittee of the Senate Committee on Military Affairs. Part 13 of the

plication of the Pennsylvania Railroad to install a system of communication between trains and the wires alongside the track on a part of its main line.[32] The Federal Communications Commission has been advised that 40 railroads, representing 66.8 percent of the total mileage, will use end-to-end radio communication if frequencies are allocated to them.[33] In a recent report the Commission has approved the railroad use of radio and tentatively allotted frequencies substantially as requested.[34]

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printed report of the Hearings contains a discussion and compilation of the material dealing with this problem. See Hearings before Subcommittee of the Senate Committee on Military Affairs pursuant to S. Res. 107 and on S. 702, 78th Cong., 2d sess., *Scientific and Technical Mobilization—Use of Radio for Railroad Communication and Signaling*, pp. 1559–1653.

[32] Interstate Commerce Commission, *In the Matter of Application for Approval of Proposed Modifications of Systems or Devices Under Paragraph (b) Section 25 of the Interstate Commerce Act as amended, The Pennsylvania Railroad Company*, BS–Ap–No. 6729, Order of December 2, 1944. A similar application from the Atlantic Coast Line is pending before the Commission.

[33] Federal Communications Commission, *In the Matter of: Allocation of Frequencies to the Various Classes of Non-Governmental Services in the Radio Spectrum from Ten Kilocycles to Thirty Million Kilocycles*, Docket No. 6651, Exhibit 481, pp. 4–5.

[34] *Id., Report of Proposed Allocation from Twenty-five Thousand Kilocycles to Thirty Million Kilocycles* (January 1945, pp. 149–170). At the close of hearings held in a related proceeding (Federal Communications Commission, *In the Matter of Investigation of the Establishment and Use of Radiocommunications Systems in Railroad Operations*,

These methods of eliminating the factors which make long train operations slightly more difficult do not require a departure from the modern method of train operations or increase the likelihood of injury from other causes. Inasmuch as the safety problem can be and is being solved in other ways, the burden on commerce imposed by the Arizona law is not justified.

4. *The Burden upon Commerce Imposed by the Train Length Limitation So Outweighs Its Value, If Any, in Preventing Accidents as to Require that it be Held Unconstitutional*

The effects of a state train length limitation, as disclosed in the preceding discussion, are to impede and delay interstate transportation, to require carriers to abandon the method of operations prevalent throughout the country, and to increase railroad accidents and casualties generally without decreasing the number of those resulting from slack action alone. The lack of uniformity in regulation which state control over this subject creates is in itself a primary cause of the interference with commerce.

Many decisions which this Court has rendered with respect to the validity of state laws affecting interstate commerce indicate that, whatever the method of expression or the result, the Court is guided largely by the practical effects of a statute

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Docket No. 6593), Commissioner Walker stated (transcript, p. 989): "I think the testimony will clearly show the present utility and practicability of radio in yard operations and for front to rear communication in freight train service."

from the viewpoint both of its interference with national commerce and of the local benefit which will be derived from it. See pp. 15–19, *supra*. Each case stands on its own facts. There is none in which the relationship of a statute to commerce and to the public safety is precisely the same as in the case at bar. The cases are thus important because of the principles for which they stand, and not because any are controlling or directly in point.

The Court has both sustained and invalidated state laws regulating the construction, equipment and operation of vehicles or vessels engaged in interstate commerce. In the interest of safety statutes have been upheld requiring railroad passenger cars to be equipped with certain types of heaters (*New York, N. H. & H. R. Co.* v. *New York*, 165 U. S. 628), locomotives to be supplied with electric headlights (*Atlantic Coast Line R. Co.* v. *Georgia*, 234 U. S. 280), and freight trains to be equipped with cabooses (*Terminal Railroad Association* v. *Brotherhood of Railroad Trainmen*, 318 U. S. 1). In *South Covington & Cincinnati Railway Co.* v. *Covington*, 235 U. S. 537, the Court upheld the provisions of a Covington ordinance requiring an interstate street railway to keep its cars clean and fumigated and to prohibit passengers from riding on the front and rear platforms unless certain rails were provided. But in the same case the Court set aside other provisions of the ordinance prohibiting standing passengers in excess of one-third of the car seat-

ing capacity, and requiring the company to operate enough cars to accommodate the public on this basis. Such regulations, determining both the manner of carrying passengers and the number of cars to be operated between Covington and Cincinnati, governed car loadings and impeded traffic in the latter city and required more cars to be operated than Cincinnati permitted. With respect to these provisions the Court said (pp. 547–548):

> If Covington can regulate these matters, certainly Cincinnati can, and interstate business might be impeded by conflicting and varying regulations in this respect, with which it might be impossible to comply. On one side of the river one set of regulations might be enforced, and on the other side quite a different set, and both seeking to control a practically continuous movement of cars. As was said in *Hall* v. *De Cuir*, 95 U. S. 485, 489, "commerce cannot flourish in the midst of such embarrassments."

The benefit from the point of view of safety of the limitation upon overcrowding in cars was not sufficient to sustain these provisions, in view of the effect of the ordinance on the number of cars to be operated and the danger of diverse state regulations on that subject.[35] The *Covington*

[35] The Court also invalidated a provision of the ordinance requiring car temperature to be maintained at 50° Fahrenheit or above on the ground that this was impossible owing to the opening and closing of doors. 235 U. S., at 548–549.

case is important because it clearly recognizes the principle underlying the cases sustaining state police regulations relating to safety, because the effect of the ordinance in increasing the number of cars to be operated is analogous to that of the Arizona law, and because it shows the practical limits imposed upon a state's authority even when exercising its police powers.

Kelly v. *Washington*, 302 U. S. 1, sustained a state statute in so far as it provided for the inspection of the hulls and machinery of certain vessels; but the opinion definitely indicates that other portions of the state code establishing "standards and designs for the structure and equipment of vessels" and prescribing "rules for their operation * * * could not properly be left to the diverse action of the States" (p. 15). On this point the opinion further declared (*ibid.*):

> If, however, the State goes farther and attempts to impose particular standards as to structure, design, equipment and operation which in the judgment of its authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule. Whether the State in a particular matter goes too far must be left to be determined when the precise question arises.

The opinion thus stands for the proposition that state regulation of the "design, equipment and operation" of instrumentalities of interstate transportation cannot go beyond what is plainly essential to safety. The mere fact that the regulation is "desirable" "in the judgment of its [the state's] authorities" is not sufficient.

The same principle is illustrated by the decisions involving other types of state police regulations. *Erb* v. *Morasch*, 177 U. S. 584, upheld a local ordinance limiting the speed of interstate trains within city limits. But when the State of Georgia sought to require all trains so to check their speed at highway crossings as to stop in time should any person or thing be crossing the track it was held that this so impeded interstate commerce as to be beyond the state's power. *Seaboard Air Line Ry.* v. *Blackwell*, 244 U. S. 310. Each statute was a measure which, from the point of view of safety, was reasonably adapted to the public interest. But the actual interference with commerce resulting from requiring trains almost to stop at all grade crossings was regarded as outweighing the local interest in safety.

The same balancing of local and national interests has served as a guide to the decisions on state statutes requiring interstate trains to stop at small towns or county seats.[36] The Court has recog-

[36] *Illinois Central R. Co.* v. *Illinois*, 163 U. S. 142; *Gladson* v. *Minnesota*, 166 U. S. 427; *Lake Shore & M. S. Ry. Co.* v.

nized that the states may appropriately require carriers to maintain reasonable passenger service for such communities. But as long as other adequate service is provided, the courts will not permit the states to require interstate through trains to make local stops. It should be noted that the local laws involved in these cases were held to burden commerce because of their effect in slowing down interstate through service.

Some of the earlier cases in the groups just discussed seem to assume that if a statute is an exercise of the state police power, it cannot constitute a direct or undue burden on interstate commerce.[37] Although these decisions can be justified on their facts, the assumption is obviously not correct, as the *Blackwell* case demonstrates. In setting aside a state order that an interstate railroad bridge be removed in order to prevent overflows of flood waters into Kansas City, the Court, speaking through Mr. Justice Holmes, declared

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Ohio ex rel. Lawrence, 173 U. S. 285; *Cleveland, C., C. & St. L. Ry. Co.* v. *Illinois*, 177 U. S. 514; *Mississippi Railroad Comm'n* v. *Illinois Central R. Co.*, 203 U. S. 335; *Atlantic Coast Line R. Co.* v. *Wharton*, 207 U. S. 328; *Herndon* v. *Chicago, R. I. & P. Ry. Co.*, 218 U. S. 135; *Chicago, B. & Q. R. Co.* v. *Railroad Commission*, 237 U. S. 220; *Gulf, C. & S. F. Ry. Co.* v. *Texas*, 246 U. S. 58; *St. Louis & San Francisco Ry. Co.* v. *Public Service Comm'n*, 254 U. S. 535; *St. Louis-San Francisco Railway Co.* v. *Public Service Comm'n*, 261 U. S. 369.

[37] E. g., *New York, N. H. & H. R. Co.* v. *New York*, 165 U. S. 628.

(*Kansas Southern Ry.* v. *Kaw Valley Dist.*, 233 U. S. 75, 79):

> The decisions also show that a State cannot avoid the operation of this rule by simply invoking the convenient apologetics of the police power. It repeatedly has been said or implied that a direct interference with commerce among the States could not be justified in this way.

The Court's recent decisions in *Parker* v. *Brown*, 317 U. S. 341, *Illinois Nat. Gas Co.* v. *Central Ill. Pub. Serv. Co.*, 314 U. S. 498, *California* v. *Thompson*, 313 U. S. 109, and *Terminal Railroad Association* v. *Brotherhood of Railroad Trainmen*, 318 U. S. 1, have been more explicit than the earlier cases in their recognition that the validity of state laws regulating interstate commerce is to be determined "by the accommodation of the competing demands of the state and national interests involved" (*Parker* v. *Brown*, 317 U. S., at 362). See pp. 18–19, *supra*.

In none of the cases previously discussed in which state laws have been held valid was any actual interference with interstate commerce such as is disclosed by the present record shown to exist. Nor in any of them was there reason to doubt that the local regulation would be beneficial to the health and safety of the community.

Terminal Railroad Association v. *Brotherhood of Railroad Trainmen*, *supra*, and *South Carolina Highway Department* v. *Barnwell Bros.*, 303

U. S. 177, are entirely consistent with the suggested conclusion that state train length legislation is invalid. The former case indicates that states may, in the interest of safety, regulate the composition of interstate trains to some extent, even where the necessary effect may extend a short distance into adjoining states. But in upholding the Illinois caboose order, the Court was properly influenced by the "obvious relation [of the order] to the health and safety of local workers", and by the fact that the practice of requiring cabooses at the end of trains had been voluntarily adopted by nearby railroads without legal compulsion. 318 U. S., at 8. The opinion indicates that the cost to commerce must be weighed against the cost to health and safety, and that the absence of practical interference with customary methods of railroading will count heavily in the scales. The case thus shows that both in determining whether the subject requires uniformity of regulation in the national interest and whether interstate commerce is unduly burdened, the Court is guided largely by practical considerations.

A similar approach to the present case will, we believe, lead to the opposite conclusion. The extra-territorial effect of the Illinois order was trivial as compared to that of the Arizona train limitation. Here the actual obstruction to interstate commerce is serious, the limitation of train lengths prevents the uses of the methods of transportation which generally prevail throughout the

nation, and is not justified by its value in protecting the public safety.

The *Barnwell Bros.* case stressed the long-recognized power of the states and localities over the highways which they build, own and maintain, specifically contrasting the position of the highways with that of the railroads (303 U. S., at 186–187). Since the states maintain the highways, it is appropriate for them to determine what traffic can safely be carried. Furthermore, although interstate motor traffic is undoubtedly extensive, the proportion of local highway traffic is clearly much greater than on the railroads. The impact of state highway regulation on local trucking, which serves as a restraint upon legislative action, is relatively much heavier than that of the Arizona statute upon intrastate rail operations. Since control of the highways from the viewpoint of safety has long been left to the states it is an appropriate field for state action and perhaps for application of a rule that any rational legislative judgment will be given effect. But the Court's citation of *Seaboard Air Line Ry.* v. *Blackwell*, which involved a law undoubtedly relating to safety, indicates that it recognizes that the power of the states over the railroads cannot be tested in the same way.[38]

[38] The *Barnwell* opinion contained the following passage applicable to railroads (303 U. S., 186–187):

"The commerce clause has also been thought to set its own limitation upon state control of interstate rail carriers

Appellee's position is that the validity of the state law depends "entirely" on whether it has "a rational basis in safety" (Br., p. 88). If it "has no rational relation to safety, the burden on interstate commerce * * * is * * * *direct* and the law is unconstitutional" (Br., pp. 80, 88–89). But "a statute having a real relation" to safety only "indirectly burdens interstate commerce" and is therefore not invalid (Br., p. 21). Appellee candidly admits that under this theory "the extent of the burden [on interstate commerce] is *not* a question or element to be considered by the Court * * *" (pp. 80, 18). Once the rational relationship to safety appears, whether the state law burdens commerce and how much is said to be a matter solely for legislative, not judicial, consideration (Br., p. 81); the test of the validity of the commerce clause is said to be identical with that of the Fourteenth Amendment. Stated in another way, the proposition is that no matter how greatly interstate commerce is impeded, a state law en-

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so as to preclude the subordination of the efficiency and convenience of interstate traffic to local service requirements.'" "* * * Although the states have usually been allowed to impose burdens on interstate railroads in the interest of local safety, *Smith* v. *Alabama*, 124 U. S. 465; *Nashville, C. & St. L. R. Co.* v. *Alabama*, 128 U. S. 96; *New York, N. H. & H. R. Co.* v. *New York*, 165 U. S. 628; *Chicago, R. I. & P. R. Co.* v. *Arkansas* 219 U. S. 453; *St. Louis, I. M. & S. R. Co.* v. *Arkansas*, 219 U. S. 518; cf. *Henningtón* v. *Georgia*, 163 U. S. 299, an unnecessarily harsh restriction, even though it is in the interest of safety, has been held to be unconstitutional. *Seaboard Air Line Ry.* v. *Blackwell*, 244 U. S. 310."

acted in the interest of safety is of local concern and valid so long as rational.

This Court's decisions have not turned on any such mechanical dialectic. The suggestion that in determining whether a state law—relating to safety or anything else—contravenes the commerce clause this Court must completely disregard its effect on interstate commerce is a novel one. Appellee does not deny that outside of the field of "police" or "safety" regulations this Court balances the national and local interests, including, of course, the burden on commerce, in determining validity. *South Carolina Highway Department* v. *Barnwell Bros.*, 303 U. S. 177, and earlier cases are cited, however, to show that this test may not be applied to safety measures. But the more recent statement of the controlling principle in *Parker* v. *Brown*, 317 U. S. 341, 362–363, which appellee claims is inapplicable here, cites the *Barnwell* case as one of the supporting authorities without differentiation between decisions involving safety and other cases. And *Terminal Railroad Association* v. *Brotherhood of Railroad Trainmen*, 318 U. S. 1, which unquestionably involved a state regulation of safety, declared that "the governing principles were recently stated in *Parker* v. *Brown*" (p. 8), and then proceeded to apply them.

Appellee's argument that the standard of rationality from the viewpoint of safety which has

been applied in determining validity under the Fourteenth Amendment is identical with the test under the commerce clause is predicated upon the soundness of its contention that the extent of the burden on interstate commerce is irrelevant. In a Fourteenth Amendment case the latter factor, of course, is not material. But if the effect on commerce is a factor of consequence in dealing with commerce problems—as we think must be clear—the nature of the question necessarily becomes different from that considered under the Fourteenth Amendment. The issue is not whether a legislature has acted arbitrarily or irrationally with respect to individual rights in life, liberty or property, but whether the impingement upon the national interest in commerce is too great to be warranted by the local benefits derived from the state law.

Appellee asserts (Br., pp. 86, 88) that it has found no cases supporting the view that the criteria under the two constitutional provisions are not the same. The point has probably been too obvious to elicit much comment. *Seaboard Air Line Railway* v. *Blackwell*, 244 U. S. 310 (*supra*, p. 48), and *South Covington & Cincinnati Ry. Co.* v. *Covington*, 235 U. S. 537 (*supra*, pp. 45–47), constitute square holdings that a state law rational from the standpoint of safety may still be unconstitutional under the commerce clause. As has been pointed out, *Termin Rail-*

road Association v. *Brotherhood of Railroad Trainmen* weighed the "costs to commerce * * * against the cost to * * * health and safety" of the order there involved, in a manner definitely inconsistent with appellee's position. And in his separate opinion in *International Harvester Co.* v. *Department of Treasury;* 322 U. S. 340, 353, Mr. Justice Rutledge recently said, in dealing with a similar problem:

> There may be more than sufficient factual connections, with economic and legal effects, between the transaction and the taxing state to sustain the tax as against due process objections. Yet it may fall because of its burdening effect upon the commerce.

Compare also *Schollenberger* v. *Pennsylvania,* 171 U. S. 1, 15–17, with *Powell* v. *Pennsylvania,* 127 U. S. 678, and *Leisy* v. *Hardin,* 135 U. S. 100, 121–124, with *Mugler* v. *Kansas,* 123 U. S. 623.[39]

Appellee asserts (Br., p. 34) that "whether the burden on interstate commerce by reason of the statute *is too great* is a legislative, and not a judicial question". This cannot mean that a state legislature is to be the final authority as to the validity of an interference with interstate

[39] See the excellent discussion in Dowling, *Interstate Commerce and State Power* (1940), 27 Va. Law Rev. 1, 21, in which the author states: "The test of reasonableness in interstate commerce cases is not the same as, for example, in due process cases."

commerce, even if limited by the requirement that it not act irrationally. The argument apparently is that only Congress can determine that an interference with commerce is so great as to require the invalidating of a state law. But in hundreds of decisions stemming from *Gibbons* v. *Ogden*, 9 Wheat. 1, this Court has been committed to the doctrine that the commerce clause, of its own force and in the absence of congressional action, precludes the states from interfering unduly with the national interest in the free flow of commerce. Although there may have been differences of opinion both as to the principle and its application, we do not think it necessary on this occasion to enter into a defense of so well established a doctrine. To the extent that appellee's argument rests on the supremacy of congressional power, it overlooks the effect of the long-established doctrine itself in furnishing a setting for determining the will of Congress. In view of the fact that matters of national concern demanding uniformity of regulation have for almost a century been treated as invalid except where Congress has indicated otherwise, Congress would normally assume that it was unnecessary for it to negative state legislation of that character.

In the light of these established principles appellee apparently limits its argument that the courts have no authority to look to the extent of

interference with interstate commerce to state laws relating to public safety. These are said invariably to be matters of peculiarly local concern. Although this may normally be true, it certainly does not inevitably follow. The law requiring stopping at grade crossings would, as the *Blackwell* case indicates, have more than doubled railroad running time. Indeed, a state might completely prohibit all railroad operations or air transportation on the ground that such a course would prevent accidents, a conclusion which certainly would be rational. Or a state might, with complete rationality from the viewpoint of safety, find that broader gauge cars and locomotives would not be overturned as easily as those presently used, and order that all railroads within the state widen their tracks and rolling equipment. Although such a regulation would bear a rational relationship to safety, it would completely disrupt the movement of interstate rail traffic through a state. To say that because such laws were reasonably related to the public safety they were of local rather than national significance would be to establish a fictitious standard entirely divorced from the hard-headed practicality embodied in the commerce clause. One cannot decide whether a matter is of national concern or demanding national uniformity if one looks only to its local impact and ignores all the facts which show its effect on the nation's commerce. As the

cases cited, *supra*, pp. 55–56, demonstrate, this Court has adopted no such automatic or inflexible formula in cases involving the public safety any more than elsewhere.

The alternative to a rigid formula is that the Court exercise a policy judgment. But this is implicit in the doctrine enunciated in *Parker* v. *Brown* that the national and local interests must be accommodated. This cannot be avoided unless the Court should take either the position that all state regulations of interstate commerce are bad, or that all are valid until Congress declares otherwise, extremes which have long been abandoned.[49]

The principle for which the cases as a whole stand is that a state safety regulation, even when applicable to interstate vehicles, is normally to be upheld, unless the actual interference with commerce resulting from it will be serious. In the cases which sustain state regulations there has always been a reasonably clear showing—if it was not obvious on the face of the statute—that the

[49] Even if, as has been suggested, the clause were regarded as invalidating only state laws which in some way discriminate against interstate commerce—

> the Court must make the same sort of value judgment that it has been making in performing its broader protective function. Discrimination exists or not, depending upon whether there is an economic justification for the difference in treatment which the state accords interstate commerce. Only by an evaluation of all the facts and circumstances can such an issue be decided by the Court. (Dowling, *supra*, p. 56 n., at p. 16.)

law bore a close relation to safety, and there was no burden upon commerce comparable to that demonstrated here. The latter alone, we think, would suffice to invalidate the Arizona statute. But in addition this is the first case in which it has definitely been proved that a state police regulation is not essential to protect health and safety. In such circumstances even less interference with interstate commerce should be permissible than would otherwise be the case.

In this connection it is important to note that our argument does not depend on whether the evidence affirmatively establishes that the effect of the train limitation is to increase railroad accidents generally, or that the limitation does not to some extent reduce the number of slack accidents. For if, instead of having the harmful effect on the public safety found by the trial court, the law had no effect one way or the other or even a slightly beneficial one—and that is certainly the most which can be said for it—this would not be sufficient to outweigh the interference with interstate commerce which results from state regulation of the subject of train lengths.

Our conclusion that the Arizona statute should be held to impose an undue burden upon commerce and to operate in a field exclusively reserved for Congress is supported by the only pertinent opinion of the Interstate Commerce Commission, which suspended the state train limit

statutes for the duration of the war. *In the Matter of Service Order No. 85*, 256 I. C. C. 523.[41] The Commission forbore from expressing an opinion on the legal question as to the validity of the state regulations. But its conclusions of fact—as well as the substance of its discussion—clearly indicate that it regards such laws as seriously burdening commerce. The following passages from the Commission's report speak for themselves (pp. 524, 530–531, 534, 536):

> Service Order No. 85 became effective September 15, 1942. It was designed to save manpower, motive power, engine-miles, and train-miles; to avoid delay in the movement of trains; to increase the efficient use

[41] The opinions of the lower courts, including that in the instant case, are evenly divided. We do not read the opinions of the court below in this case or of the federal district court in *M.-K.-T. R. Co.* v. *Williamson*, 36 F. Supp. 607 (W. D. Okla.), as contraverting any of the facts found by the trial court in the present case or the federal district courts in *Atchison, T. & S. F. Ry. Co.* v. *La Prade*, 2 F. Supp. 855 (D. Ariz.) and *Southern Pacific Co.* v. *Mashburn*, 18 F. Supp. 393 (D. Nev.). The three decisions last cited held that the subject of train lengths was one upon which uniformity in regulation was essential in the national interest; that the state limitation would seriously interfere with interstate rail operations, and that the statute could not be justified as a safety measure because in fact it would not tend to reduce the number of accidents. The same view was expressed by the Kansas Public Service Commission, quoted at p. 26, n. 11, *supra*. The opinion of the Arizona Supreme Court below and that in the *Williamson* case, on which it relies, proceed on the assumption that any state regulation reasonably related to safety must be held valid, irrespective of other considerations.

of locomotives and cars and to augment the available supply thereof; and to relieve congestion at terminals caused by setting out and picking up cars on each side of the train-limit law States.

* * * * *

If State laws limiting the number of cars in trains are to be held valid (a question we do not decide), it would be possible for each State to set a different number of cars as the maximum to be hauled in a train. A State might even limit the length of trains to one car, although such a law would be clearly arbitrary and unreasonable. Higher limits might be set by States and found reasonable, *but lack of uniformity would place a serious burden on interstate commerce.*

* * * * *

This language [from *California* v. *Thompson*] is significant because train-limit laws are not matters of local concern and the regulation of the number of cars which may be put in a train does infringe the national interest in maintaining the free flow of commerce under the present emergency war conditions.

* * * * *

* * * The fact that freight trains in excess of 70 cars and passenger trains in excess of 14 cars are safely operated in other States is convincing evidence of its safety, except where unusual operating conditions exist. * * * [Italics supplied.]

II

The Specific Intention of Congress as to State Train Length Legislation

The validity of state legislation regulating interstate commerce depends in the first instance on whether there has been any expression of congressional intention with respect to it. If Congress has enacted inconsistent legislation or "occupied the field" in such manner as to manifest an intention that state regulation of the subject be excluded, state regulation falls even though it would be valid in the absence of such congressional action.[42] If, on the other hand, Congress has manifested its intention to permit certain state regulations, the latter may be valid even though the field were otherwise subject to exclusive Federal control.[43] It is necessary to determine whether the state regulation contravenes the commerce clause in the silence of Congress only when Congress has not spoken.

Unsuccessful efforts have been made to procure the enactment of a Federal train limit law. In addition, the Interstate Commerce Act has been construed by the Interstate Commerce Commission as giving it authority, at least in some circumstances, to suspend state train-length lim-

[42] *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, and cases cited.

[43] *In re Rahrer*, 140 U. S. 545; *Whitfield* v. *Ohio*, 297 U. S. 431; *Parker* v. *Brown*, 317 U. S. 341.

itations. Our analysis of these matters has led us to the conclusion that no positive inference can be drawn from them that Congress had an intention one way or the other as to whether state legislation shall stand. We shall, however, summarize the pertinent material for the information of the Court.

A. FEDERAL TRAIN LENGTH BILLS

A number of bills for the limitation of train lengths were introduced in Congress between 1934 and 1937.[44] Hearings were held by subcommittees of the Senate Committee on Interstate Commerce in 1934 and 1935,[45] but the bills were not reported by the Committee. In 1937, on the basis of the prior hearings, the Senate Committee reported a seventy-car bill favorably[46] on the ground that such a limitation was conducive to safety, and would result in greater frequency of trains and thus improve transportation service; it was also noted (p. 9) that the "measure might result in some reemployment" of railway labor. The bill passed the Senate,[47] and was referred to the House

[44] S. 2625, H. R. 7399 and H. R. 7401 (73rd Cong., 2nd sess.); S. 27, S. 344, and H. R. 169 (74th Cong., 1st sess.); S. 69, S. 1108, and H. R. 147 (75th Cong., 1st sess.).

[45] Hearings before Subcommittee of Senate Committee on Interstate Commerce, 73rd Cong., 2d sess., S. 2625, *Limiting the Car Lengths of Trains;* Hearings before Subcommittee of Senate Committee on Interstate Commerce, 74th Cong., 1st sess., S. 27 and S. 344, *To Limit Length of Trains in Interstate Commerce.*

[46] S. Rep. No. 416, 75th Cong., 1st sess.

[47] 81 Cong. Rec. 7596.

Committee on Interstate and Foreign Commerce.[48] Extensive hearings, totalling over 1100 pages in print, were then held by the House Committee.[49] Railway labor organizations introduced evidence as to the number of trainmen injured on long trains.[50] Railroad management countered with voluminous evidence, similar to that in the present record, minimizing the number of such accidents and to the effect that more accidents proportionally occurred where carriers were subjected to train length limitations than on comparable lines.[51] The Committee failed to report the bill, and it was not passed.

The attention of the committees was called to the history of state train length limitation statutes.[52] The experience of the carriers in Arizona, which up to that time was the only state in which such a law had been in operation, provided the basis for comparison with that where longer trains were operated.[53] The attention of the committees was also called to the fact that the state laws had

[48] *Id.*, 7711.

[49] Hearings before House Committee on Interstate and Foreign Commerce, 75th Cong., 3d sess., S. 69, Train Lengths.

[50] *Id.*, pp. 204–205, and *Supplement to Hearings*.

[51] *Id.*, at pp. 360–654, 827–888, 894–926, 947–1011.

[52] Hearings on S. 27 and S. 344, *supra*, n. 45, pp. 148, 163, 166, 173, 207, 235, 275, 281; Hearings on S. 69, *supra*, n. 49, pp. 374, 376–80, 421–537.

[53] Hearings on S. 27 and S. 344, pp. 247, 275–81; Hearings on S. 69, pp. 374, 376–80, 421–537.

been held unconstitutional by each of the courts which had, up to that time, passed on their validity on the merits,[54] as well as to the fact that the carriers were making efforts to test the Arizona Act again in this Court.[55] In the two of these cases in which opinions were rendered, the courts had held that the subject of train length limitations was one requiring national uniformity and within the sphere of exclusive Federal regulation.[56]

The history of these bills does not, we think, afford the basis for deducing that Congress had any intention at all with respect to the validity of *state* train length legislation. No committee and no member of Congress expressed any views on that subject. The most that can be said is that Congress was informed that Arizona had such a law, that there was a question as to its constitutionality, and that some Congressmen favored a similar Federal regulation and that others apparently did not.

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[54] *Atchison, T. & S. F. Ry. Co. v. La Prade*, 2 F. Supp. 855 (D. Ariz.), reversed on jurisdictional grounds in *Ex parte La Prade*, 289 U. S. 444; *Southern Pacific Co.* v. *Mashburn*, 18 F. Supp. 393 (D. Nev.); *Texas & N. O. R. Co.* v. *Martin*, *No. 428—Equity* (E. D. La., unreported). Contrary decisions were not rendered until the decision in the Oklahoma case (*M.-K.-T. R. Co.* v. *Williamson*, 36 F. Supp. 607 (W. D. Okla.) in 1941.

[55] See Hearings on S. 69, *supra*, at pp. 429–446.

[56] See note 41, *supra*, p. 61.

B. SECTION 1, PARAGRAPHS 10–17 OF THE INTERSTATE COMMERCE ACT

On September 11, 1942, the Interstate Commerce Commission issued Service Order No. 85,[57] which Order required the carriers to—

> operate their trains, when necessary for the prompt movement of freight and the clearing or avoidance of congestion by either freight or passenger trains, without regard to any rules, regulations, practices, or laws now in effect and being enforced in the various States limiting the length of freight trains to not more than one-half mile and limiting the number of cars in a railroad freight train to 70 cars, or limiting the number of cars in a railroad passenger train to 14 or 16.

The Order recited that—

> This order shall remain in effect during the war in which the United States is now engaged, unless sooner terminated by subsequent order of the Commission; and that this order, being based upon conditions of war emergency, shall not constitute a precedent for peace time operations.

The Order also recited briefly the facts upon which it was based, as follows—

> * * * compliance by railroads subject to the Interstate Commerce Act with such rules, regulations, practices, and laws, dur-

[57] 7 Fed. Reg. 7258. The Order is printed in full in Appendix C, pp. [redacted], *infra*.

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ing the present emergency, may result in congestion of tracks and terminals, wasteful use of locomotives, and interference with the free flow of traffic necessary in the present emergency; and that railroad freight trains exceeding one-half mile in length, or exceeding 70 cars in length, and railroad passenger trains exceeding 14 or 16 cars in length may be operated in accordance with safety standards now applicable, during the present emergency, in and through such States, and that such operation will facilitate the free flow of traffic necessary during the present emergency.

The Order was entered without a hearing, as an emergency war measure, as permitted under Section 1 (15) of the Interstate Commerce Act.[58]

The four train service brotherhoods, representing engineers, firemen, conductors and brakemen, petitioned for a rehearing before the Commission. They indicated that they were not requesting that evidence be taken but only wished to file briefs attacking the legal authority of the Commission to make the Order.[59] After the filing of briefs by interested parties, including the Secretary of War in support of the Order, the Commission on November 18, 1943, issued a report (*In the Matter of Service Order No. 85*, 256 I.

[58] There were informal conferences with representatives of the States and of the railroad brotherhoods. 256 I. C. C., at 524.

[59] *Ibid.*

C. C. 523), in which it denied the application to set aside the Order.

The Commission found that the Order was authorized by Section 1, paragraphs 10–17 of the Interstate Commerce Act,[60] interpreted as required by the policy section. The harmful consequences of compliance with the Arizona and Oklahoma train length laws, as recited in the Commission's original order (*supra*, pp. 67–68), which had not been denied by the petitioning brotherhoods, were reaffirmed. In sustaining its own jurisdiction to suspend the operation of the state laws, the Commission found it unnecessary to decide whether the state laws were otherwise valid

[60] Paragraphs 14 and 15 permit the Commission to establish after a hearing, or in time of emergency to suspend without hearing, "rules, regulations and practices with respect to car service". Paragraph 10 defines car service as including "the use, control, supply, movement * * * of locomotives, cars, and other vehicles used in the transportation of property, * * * and the supply of trains". Paragraph 16 provides that:

"Whenever the Commission is of opinion that any carrier by railroad subject to this part is for any reason unable to transport the traffic offered it so as properly to serve the public, it may, upon the same procedure as provided in paragraph (15), make such just and reasonable directions with respect to the handling, routing, and movement of the traffic of such carrier and its distribution over other lines of roads, as in the opinion of the Commission will best promote the service in the interest of the public and the commerce of the people, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable."

or whether Congress had occupied the field of legislation with respect to the operation and length of trains, (256 I. C. C., at 530, 539). But see pp. 61–62, *supra*.

The Commission's Order, issued in 1942, was not, of course, in effect in 1940 when the present suit was brought against the Southern Pacific for violation of the state law during that year. Thus, in so far as this case is concerned, there is no conflict between the state law and an exercise of jurisdiction by the Interstate Commerce Commission. The question here is whether the grant of power by Congress to the Commission, prior to such exercise, supersedes state legislation.

A question may be raised as to whether the Interstate Commerce Act does vest the Commission with the power it exercised in Service Order No. 85. That Order is currently under attack by the railroad brotherhoods in *Johnston* v. *United States*, Civil Action No. 1408, pending in the Western District of Oklahoma. This Court, of course, need not determine whether and to what extent the car service provisions of the Interstate Commerce Act have "occupied the field" unless the Commission is correct in concluding that the Act does reach the subject of train lengths. To that question we now turn.

1. *The Authority of the Commission*

Paragraphs 10–15 of Section 1 of the Inter-

state Commerce Act, *infra*, pp. [redacted]–97 deal with car service, and the Commission is empowered to make or suspend rules, regulations or practices "with respect to car service". "Car service" is defined in Paragraph 10 (*infra*, p. [redacted]) as including "the use, control, supply, movement, distribution, exchange, interchange, and return" of locomotives and cars, and the "supply of trains". A rule or practice whereby the operation of over a certain number of cars in a train is prohibited is one governing the "use" of locomotives and cars, as well as perhaps their "control" and "movement". In addition, since the regulation as to the number of cars permitted in a train determines the number of locomotives and trains required to move a given amount of traffic, the subject is one relating to the *"supply"* of locomotives and trains within the meaning of the definition. The language of these paragraphs is thus broad enough to enable the Commission to reach the subject of train lengths.

The Act contains its own criterion for the construction of its provisions. In the Transportation Act of 1940 Congress enacted the introductory section to the Interstate Commerce Act, already referred to (p. 33), which declared it

> to be the national transportation policy of the Congress * * * to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several car-

> riers; * * * all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, * * * and of the national defense:

The section then states that:

> All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

The facts upon which the Commission's order was based, which were not disputed and are confirmed by the present record, warranted the Commission in concluding that "adequate" and "efficient" transportation service will be promoted by a construction of the Act as empowering the Commission to suspend state train length limitations. Indeed, at the present time, "the needs of the commerce of the United States * * * and of the national defense" cannot be filled in time of war or emergency if train length limitations are in effect and obeyed. This appears from the uncontroverted facts upon which Service Order No. 85 was based; when traffic is at a maximum, the limitation wastes manpower and motive power, and causes delay and congestion. A construction of the Act which will enable the Commission to deal with such limitations, as it has, in periods of crisis, is thus in accord

with the basic purposes of the Act as expressed by Congress.

A similar conclusion can be reached with respect to paragraph 16 of Section 1, which provides that when a carrier is unable to transport the traffic offered it so as properly to serve the public, the Commission may make just and reasonable directions "with respect to the handling, routing, and movement of the traffic of such carrier and its distribution over other lines of roads, as in the opinion of the Commission will best promote the service in the interest of the public and the commerce of the people". Certainly an order relating to the number of cars in a train has to do with the "handling" and "movement" of the traffic. The reference to the distribution of such traffic over other lines of road is not a limitation upon what precedes it, but a specific authorization of one kind of order which the Commission may enter when necessary. The latter may well have been required in order to give the Commission power to render that type of relief. The language of paragraph 16 in itself, apart from the general policy section of the Transportation Act, imports that it be construed so as to accomplish its objective of eliminating obstructions to traffic in the interests of the public and of commerce. Even if the section can be more narrowly interpreted, it should be construed in the manner most consistent with these vital national interests.

As against these considerations it has been argued that paragraphs 10–17 of the Interstate Commerce Act cannot be construed as permitting the control of train length practices because this was not the evil at which those paragraphs were directed when they were passed. The contention is that Congress had in mind only rules, regulations and practices governing the interchange of cars between railroads and related matters, which are the subjects customarily treated in car service rules. It is true that there is no indication in the legislative history of either the original Car Service Act of 1917 (40 Stat. 101) or the amendments of 1920 (41 Stat. 476) that Congress was concerned as to the number of cars in a train. At that time the long-train method of operation was not generally prevalent, and although Arizona had its train limit statute the law might not then have been regarded as an impediment to commerce. The 1917 Act was prompted by a freight car shortage resulting in part from the misuse of interchanged cars, which often deprived the owning lines of necessary equipment for unduly long periods.[81] But other factors contributing to the shortage, as noted in the House Report,[82] were

[81] See H. Rep. No. 18, 65th Cong., 1st sess.; S. Rep. No. 43, 65th Cong., 1st sess.; Interstate Commerce Commission, Annual Report, 1916, p. 73; *Car Supply Investigation*, 42 I.C.C. 657.

[82] H. Rep. No. 18, *supra*, at p. 3.

insufficient trackage, cars and motive power and inefficient operations.

The original 1917 Act gave the Commission full power to deal with the interchange and distribution of cars between railroads. The "car service" which it subjected to the Commission's jurisdiction was defined as including "the movement, distribution, exchange, interchange and return of cars used in the transportation of property". All of these words except perhaps "movement" were concerned with the abuses responsible for the legislation, and the Act applied only to freight cars. But the Transportation Act of 1920 amended the car service provision by adding the words "use," "control," and "supply" to the definition, by making it applicable to locomotives as well as cars, and also by including "the supply of trains." 41 Stat. 476. Paragraph 16, which does not deal with car service at all, was also added at that time. 41 Stat. 477.

The House Report and debates state only that the amendment to the definition of "car service" was intended to give the Commission power to compel a carrier to supply itself with cars.[63] This would not, however, account for all of the changes, inasmuch as the words "use" and "control" were added in addition to the word "supply". A further amplification of what was in-

[63] H. Rep. No. 456, 66th Cong., 1st sess., p. 17; 58 Cong. Rec. 8315–8316.

tended appears in the statement of Commissioner Clark of the Interstate Commerce Commission at the hearing on the Bill.[64] He stated that the new language would enable the Commission to require the carriers to provide themselves with cars and locomotives, and also that "The use and supply of cars are new terms in the definition of 'car service,' and they largely expand the jurisdiction of the act and of the commission thereunder." With respect to the phrase "supply of trains" (which at that stage also included the words "movement" and "operation"),[65] he stated:

> The other new provision in this definition of "car service" is the extension of the jurisdiction to the supply, movement, and operation of trains. That, as will appear later, will come into play in times of emergency, car shortage, etc., and in connection with the common use of tracks or terminals, when the public interest demands such use.

The brief references to these changes made in 1920 are not sufficient to explain all of the new words added, such as the "use" and "control" of cars and locomotives; nor are the explanations at all clear as to the meaning of "supply of trains". Since these are broad terms incorporated in a statute designed to deal with emergencies, it would

[64] Hearings before H. Committee on Interstate and Foreign Commerce on H.R. 4378, 66th Cong., 1st sess., pp. 11-12.

[65] No explanation was made as to the reason why the conference committee deleted these words.

not seem that Congress intended them to be restricted, contrary to their literal meaning, to apply only to the exact kind of difficulty which had previously occurred. Congress was concerned with the basic problem of shortage of cars, locomotives and trains in time of emergency,[66] as the opening clauses of paragraph 15 plainly show. It is consistent with this purpose, as well as with the principles that all the words of a statute should be given effect and their normal meaning, that the Act not be limited in its scope to the causes of shortage envisaged by Congress at that time. "If Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators." *Barr* v. *United States*, No. 287, this Term, decided February 5, 1945 (slipsheet p. 5); *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 644;[67] *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 257;

[66] Although the Commission's power was not limited to periods of emergency (Section 1 (14)), Congress was thinking in terms of emergency.

[67] In the *Dartmouth College* case, the Court declared with respect to a question of constitutional interpretation, in which the case before it seems to come within the words used (4 Wheat., at 644–645):

> It is not enough to say, that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case being

Browder v. *United States*, 312 U. S. 335, 339; *Ozawa* v. *United States*, 260 U. S. 178, 195–196; *Pickhardt* v. *Merritt*, 132 U. S. 252, 257. If a shortage of locomotives and trains results from a train length limitation instead of from maldistribution of cars as between carriers, the Act will accomplish its objective if it permits the Commission to take steps to see that the shortage is overcome, not if it is limited to the difficulties confronting the nation and the carriers in 1917.

Paragraph 16 was added to the Interstate Commerce Act in 1920. The legislative history of the Act contains little or no mention of the paragraph, but we think it can be assumed that Congress had in mind the transportation of traffic by other roads when a carrier was unable properly to haul the traffic offered to it. But the object of the paragraph was to insure the movement of the traffic. This object might be attained by an order directing that the obstacle be removed by other means than requiring the traffic to be handled by other roads. Particularly would this be true when, as at the present time, the other roads are also operating to capacity; unless the Commission could in such instances use orders improving the handling by the road responsible for

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within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception.

the difficulty, the interference would not be overcome and the total carrying capacity of the nation would be impaired. Since a literal reading of the paragraph enables it to be construed broadly so as to achieve its underlying purpose, it should not be limited in its scope to the particular type of obstruction to commerce with which Congress was then familiar.

There are statements in several of this Court's opinions which support a narrower construction of the Act. In *Peoria & Pekin Union Ry. Co.* v. *United States*, 263 U. S. 528, the Court held that the definition of "car service" did not encompass the requirement that one railroad switch cars for another, saying (p. 533):

> * * * But "car service" connotes the use to which the vehicles of transportation are put; not the transportation service rendered by means of them. Cars and locomotives, like tracks and terminals, are the instrumentalities. To make these instrumentalities available in emergencies to a carrier other than the owner was the sole purpose of subparagraphs a, b, and c.

But this decision was limited in *United States* v. *Michigan Cement Co.*, 270 U. S. 521, which upheld a service order under paragraph 15 providing that coal was to be delivered to certain classes of consumers ahead of others. This order could not be sustained if the Court had followed the statement in the *Peoria & Pekin* case that "car service" included only rules relating to the exchange of

equipment between carriers, inasmuch as the service order in the *Cement* case governed the control of cars by the carriers without regard for any interchange. In upholding this order the Court limited the *Peoria & Pekin* decision to the facts there involved. (270 U. S., at 527.)

Railroad Commission of California v. *Southern Pacific Company*, 264 U. S. 331, 343, contains a brief summary of the car service provisions as related to distribution and exchange of cars and equipment, and states that "Paragraph 16 authorizes the Commission to provide transportation by other carriers if one carrier is unable to handle its traffic on terms fixed by the Commission". But these statements did not on their face purport to be exclusive, and they mention only those phases of the statute which were pertinent to the problem then before the Court, whether California could compel the carriers to build a union station in Los Angeles without the approval of the Commission under paragraphs 18–21 of Section 1. The portions of the opinion referred to were clearly dicta, and obviously were not intended to express an opinion on the general scope of the car service provisions.

A broad construction of the car service provisions is supported by the Commission's decision in 1926 in *Train Service on Northern Pacific*, 112 I. C. C. 191, where it held that it had jurisdiction to regulate a single carrier's supply of freight

trains for use on its own line—a subject having nothing to do with the interchange or distribution of equipment as between carriers. In addition the three-judge district court in the first Arizona train length case (*Atchison, T. and S. F. Ry. Co. v. La Prade*, 2 F. Supp. 855, 860 (D. Ariz.))[68] specifically held

> The power conferred by Congress upon the Interstate Commerce Commission to regulate the supply of trains must necessarily include authority to prescribe the number of interstate trains to be operated by the carrier. * * *

The conclusion we draw from the above analysis is that the Interstate Commerce Act does grant the Commission power over rules and practices which limit the number of cars in a train. But this conclusion does not determine the validity of state train length limitations before the Commission has acted. There remains to be considered the extent, if any, to which the Interstate Commerce Act has excluded the states from the field.

2. *Whether Section 1 (10)–(17) of the Interstate Commerce Act Has Occupied the Field*

The problem as to whether paragraphs 10–17 of Section 1 of the Interstate Commerce Act have "occupied the field" so as to exclude state train length legislation arises only if these paragraphs

[68] Reversed in this Court on jurisdictional grounds. *Ex parte La Prade*, 289 U. S. 444.

reach that subject. It will not arise, of course, if the Court should reject the construction of those paragraphs which we have advanced (*supra*, pp. 70–81) and should hold that the Commission does not possess the power which it has exercised. The validity of the state law would then be determined without regard for the Interstate Commerce Act, and would depend upon whether the statute contravened the limitations imposed by the commerce clause itself (see Point I). The remainder of the discussion here, therefore, will assume that Section 1 of the Interstate Commerce Act does authorize the Commission to control the subject of car lengths.

It is also necessary to assume for present purposes, contrary to the position we have taken in Point I, that the state law would be valid apart from the Interstate Commerce Act. For the problem of "occupation of the field" presupposes a state law which would be constitutional if there were no conflicting or superseding Federal statute. Except in rare instances, such as the Wilson and Hawes-Cooper Acts, Federal legislation does not enlarge the powers of the states, and this is clearly true here. Whether or not Congress intended the car service provisions to supersede state laws, nothing in their language or history even remotely suggests that Congress was expanding state authority over the subject beyond that previously allowable under the commerce clause. Indeed a proviso at the end of paragraph 17 (a) (considered, *infra*, pp. 85–86), which preserves the

right of the states as to *intrastate* matters—except where inconsistent with Commission orders—demonstrates that Congress was not preserving, and certainly not enlarging, state authority over interstate transactions.

In our discussion as to whether the Federal Act has superseded the state law we shall therefore assume, *arguendo,* both that the former should be construed as we have suggested and that the latter is otherwise constitutional.

There is no question, of course, as to the invalidity of state legislation affecting commerce where there is an inconsistent Federal statute. The problem as to whether Congress has occupied the field so as to preclude its regulation by the states presents difficulties when the Federal law regulates only in part and the state law deals with a different portion of the same subject.[69] The question in such cases is as to the extent of the field which Congress intended to occupy. Here we have no such problem, since by hypothesis paragraphs 10–17 of Section 1 do reach the subject of train lengths. The question here is as to the effect of a Federal regulation which requires administrative implementation before becoming operative.

Whether a federal regulation of commerce delegating to administrative officials authority which

[69] As in *New York Central R. Co.* v. *Winfield*, 244 U. S. 147; *Adams Express Company* v. *Croninger*, 226 U. S. 491; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S 426.

has not been exercised supersedes a state law depends upon the intention of Congress. If it was intended that the federal administrative agency be given exclusive authority over the subject,—that it go unregulated except when the agency found it necessary to act—the states may not establish a regulatory system of their own. If, on the contrary, Congress did not intend the subject to go unregulated in the absence of federal administrative action, state laws applicable to the subject are valid.

These principles have been frequently applied. In *Napier* v. *Atlantic Coast Line Railroad Co.*, 272 U. S. 605, the Court held that the states could not supplement the Federal Boiler Inspection Act, which authorized the Interstate Commerce Commission to require locomotives to be equipped with devices essential to safety, by compelling the use of safety devices in addition to those required by the Commission. See to the same effect *Oregon-Washington R. & Nav. Co.* v. *Washington*, 270 U. S. 87; *Alabama and V. Ry.* v. *Jackson and E. Ry.*, 271 U. S. 244; *Missouri Pacific R. Co.* v. *Porter*, 273 U. S. 341; *Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370. On the other hand, in *Welch Co.* v. *New Hampshire*, 306 U. S. 79, the Court upheld a state maximum hours law for drivers of motor vehicles in the absence of action by the Interstate Commerce Commission under Section 204 of the Motor Carrier Act, on the ground that Congress did not intend state safety measures to be nullified before

the federal agency prescribed regulations on the subject. See to the same effect *Eicholtz* v. *Public Service Commission*, 306 U. S. 268; *Mintz* v. *Baldwin*, 289 U. S. 346; *Northwestern Bell Telephone Co.* v. *Nebraska State Ry. Commission*, 297 U. S. 471. Cf. *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Board*, 315 U. S. 740.

In determining the congressional intention as to state control over the subjects covered by the car service provisions, we are aided by a proviso, added to paragraph 17 (a) of Section 1 in 1920:

> *Provided, however,* That nothing in this Act shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this Act.

The Conference Committee Report [79] shows the deletion from the House bill, after the words "freight and passenger service", of the phrase "and the fair exchange and distribution of equipment", and the addition of the last clause, beginning with "except". This proviso is significant in three respects: (1) most obviously, since it preserves the state's right to regulate only intrastate business, it carries a strong negative implication that state authority was not to extend

[79] House Report No. 650, 66th Cong., 2d sess., p. 62.

to interstate matters and that the latter would be governed exclusively by Federal law; (2) the express provision that as to intrastate business the states must bow when the Commission acted inconsistently implies that as to interstate matters it is immaterial whether the Commission has taken affirmative action; (3) the deletion of the phrase "and the fair exchange and distribution of equipment" suggests that even as to intrastate commerce Congress may not have intended to give the states control over subjects requiring nationally uniform railroad practices.

The conclusion to be drawn from this proviso [71] closely confining the power of the states over car service is that Congress did not intend them to regulate car service in interstate commerce, whether or not the Commission had acted. This result is supported by the nature of the subject, which would seem to be one requiring national uniformity, and by decisions of this Court both preceding and following the enactment of the proviso. In *Chicago, R. I. & P. Ry. Co.* v. *Hardwick Elevator Co.*, 226 U. S. 426, the Court had held invalid a Minnesota requirement as to prompt car service to shippers on the ground that it infringed upon provisions of the Hepburn Act (now Interstate Commerce Act, Section 1 (4)) much more general than the subsequently enacted

[71] We have found nothing else in the Act or its history which throws any specific light on the intent of Congress as to the relevant state laws.

car service paragraphs.[72] In *Missouri Pac. R. Co. v. Stroud*, 267 U. S. 404, the Court held that a Missouri statute prohibiting discrimination in car service could not be applied to interstate shipments inasmuch as "Congress has enacted laws for the regulation of the furnishing of cars to shippers," citing paragraphs 10–14 of Section 1 of the Interstate Commerce Act, *inter alia*. It thus seems to have been the understanding both of Congress and of this Court that the field of car service regulation has been occupied by the Federal Government to the exclusion of the states.

We do not believe that it can be said, however, that this understanding necessarily extends to all the matters susceptible of regulation under paragraphs 10–17. These include, as we have shown, *supra*, pp. 70–81, both the subjects long covered in car service rules, such as arrangements for the interchange of cars, and also sweeping emergency powers to be exercised in periods of "shortage of equipment, congestion of traffic, or other emergency requiring immediate action" (Section 1 (15)), with respect to the use, control, supply and movement of equipment under paragraphs 10–15, and even broader powers under paragraph 16, which is not, strictly speaking, a car service regulation. These provisions would

[72] The *Hardwick* case was followed in *Hampton* v. *St. Louis, Iron Mountain & S. Ry.*, 227 U. S. 456; *Yazoo & Mississippi Valley R. Co.* v. *Greenwood Grocery Co.*, 227 U. S. 1; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Edwards*, 227 U. S. 265. See also *St. Louis Southwestern Railway Co.* v. *Arkansas*, 217 U. S. 136.

seem to have been intended to permit the Commission to cope with emergencies as best befitted the situation before it, and irrespective of whether the particular difficulty or the solution to it had been specifically contemplated by Congress when it passed the law. Although we think that Congress had a definite intention that power over the familiar types of car service regulation was to be reserved to the Federal Government exclusively, we doubt that it had a specific intention one way or the other as to other kinds of orders which the Commission might find necessary in dealing with the future contingencies capable of being reached under the broad language of the statute.

Congress undoubtedly did not, and probably could not, foresee what particular measures would have to be adopted under these powers.[73] We do not think that it can be assumed in the abstract that all steps which the Interstate Commerce Commission might take under such powers deal with subjects which the states could not previously have regulated. Thus, while in some circumstances the states may require an adequate supply of trains, including interstate trains, to meet local needs,[74] the Interstate Commerce Commission may supersede the state regulation in view of its authority to control the "supply of trains".

[73] See *Train Service on Northern Pacific Railway*, 112 I. C. C. 191, in which the Commission permitted the substitution of tri-weekly for daily mixed train service on an interstate branch line of the Northern Pacific Railway, contrary to a North Dakota statute.

[74] See cases cited, pp. 48–49, n. 36.

It is unlikely that Congress either intended the car service provisions to deprive the states of these powers prior to action by the Commission, or to expand their constitutional authority on the subject to matters which under this Court's decisions they could not otherwise have reached.

We do not suggest that the Commission's authority to issue orders with respect to the length of trains falls within the class of car service regulations specifically envisaged by Congress when the 1917 and 1920 Acts were passed. Accordingly, as to this subject, it cannot be said that Congress had an intention to supersede state laws apart from any steps taken by the Commission. In the absence of a showing that such an intention existed, the Federal statute by itself would not occupy the field. The validity of the state law would then depend upon its standing under the commerce clause, on the assumption that Congress had not specifically spoken.

CONCLUSION

For the reasons set forth in Point I of this brief, it is respectfully submitted that the judgment below should be reversed and the Arizona law held unconstitutional.

CHARLES FAHY,
Solicitor General.

ROBERT L. STERN,
Special Assistant to the Attorney General.

CAROLYN R. JUST,
Special Attorney.

FEBRUARY 1945.

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[15] *Train Service on Northern Pacific Railway, supra.*

APPENDIX A

Arizona Train Limit Law

Arizona Laws, Act of May 16, 1912.

AN ACT LIMITING THE NUMBER OF CARS IN A TRAIN

Be it enacted by the Legislature of the State of Arizona:

Section 1. It shall be unlawful for any person, firm, association, company or corporation, operating any railroad in the State of Arizona, to run, or permit to be run, over his, their, or its line of road, or any portion thereof, any train consisting of more than seventy freight, or other cars, exclusive of caboose.

Section 2. It shall be unlawful for any person, firm, association, company or corporation, operating any railroad in the State of Arizona, to run, or permit to be run, over his, their, or its line or road, or any portion thereof, any passenger train consisting of more than fourteen cars.

Section 3. Any person, firm, association, company or corporation, operating any railroad in the State of Arizona, who shall wilfully violate any of the provisions of this act, shall be liable to the State of Arizona for a penalty of not less than one hundred dollars, nor more than one thousand dollars, for each offense; and such penalty shall be recovered, and suits therefor brought by the Attorney General, or under his direction,

in the name of the State of Arizona, in any county through which such railway may be run or operated, provided, however, that this act shall not apply in cases of engine failures between terminals.

SECTION 4. All acts and parts of acts in conflict with the provisions of this act are hereby repealed.

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APPENDIX B

Pertinent Provisions of the Interstate Commerce Act

The National Transportation Policy declared by the Transportation Act of 1940 (54 Stat. 899) provides:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 1 of the Interstate Commerce Act, Part I, provides in part:

* * * * *

(10) The term "car service" in this part shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part.

(11) It shall be the duty of every carrier by railroad subject to this part to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit

to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States.

(13) The Commission is hereby authorized by general or special orders to require all carriers by railroad subject to this part, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this part relating thereto.

(14) (a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices.

(b) It shall be unlawful for any common carrier by railroad or express company, subject to this part, to make or enter into any contract, agreement, or arrangement with any person for the furnishing to or on behalf of such carrier or express company of protective service against heat or cold to property transported or to be transported in interstate or foreign commerce, or for any such carrier or express company to continue after April 1, 1941, as a party

to any such contract, agreement, or arrangement unless and until such contract, agreement, or arrangement has been submitted to and approved by the Commission as just, reasonable, and consistent with the public interest: *Provided,* That if the Commission is unable to make its determination with respect to any such contract, agreement, or arrangement prior to said date, it may extend it to not later than October 1, 1941.

(15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c)

to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

(16) Whenever the Commission is of opinion that any carrier by railroad subject to this part is for any reason unable to transport the traffic offered it so as properly to serve the public, it may, upon the same procedure as provided in paragraph (15), make such just and reasonable directions with respect to the handling, routing, and movement of the traffic of such carrier and its distribution over other lines of roads, as in the opinion of the Commission will best promote the service in the interest of the public and the commerce of the people, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the

Commission may after subsequent hearing find to be just and reasonable.

(17) (a) The directions of the Commission as to car service and to the matters referred to in paragraphs (15) and (16) may be made through and by such agents or agencies as the Commission shall designate and appoint for that purpose. It shall be the duty of all carriers by railroad subject to this part, and of their officers, agents, and employees, to obey strictly and conform promptly to such orders or directions of the Commission, and in case of failure or refusal on the part of any carrier, receiver, or operating trustee to comply with any such order or direction such carrier, receiver, or trustee shall be liable to a penalty of not less than $100 nor more than $500 for each such offense and $50 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States: *Provided, however,* That nothing in this part shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this part.

(b) It shall be unlawful for any person to offer or give or cause or procure to be offered or given, directly or indirectly, any money, property, or thing of value, or bribe in any other form whatsoever, to any person acting for or employed by any carrier by railroad subject to this part with intent to influence his decision or action, or because

of his decision or action, with respect to the supply, distribution, or movement of cars or other vehicles, or vessels, used in the transportation of property. It shall be unlawful for any person acting for or employed by any carrier by railroad subject to this part to solicit, accept, or receive, directly or indirectly, any money, property, or thing of value, or bribe in any other form whatsoever, with intent to be influenced thereby in his decision or action, or because of his decision or action, with respect to the supply, distribution, or movement of cars or other vehicles, or vessels, used in the transportation of property. Any person who violates the provisions of this subparagraph shall be deemed guilty of a misdemeanor and be subject for each offense to a fine of not more than $1,000, or imprisonment in the penitentiary for a term of not more than two years, or both such fine and imprisonment.

APPENDIX C

SERVICE ORDER NO. 85

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 11th day of September, A. D. 1942.

The Commission having under consideration operating rules, regulations, and State laws limiting the length of railroad freight and passenger trains, the Commission is of the opinion that, due to the existing state of war, an emergency exists requiring immediate action within the meaning of Section 1, paragraphs (10) to (17), inclusive, of the Interstate Commerce Act.

It appearing that certain rules, regulations, practices, and laws are now in effect and are being enforced in certain States limiting the length of railroad freight trains to not more than one-half mile and limiting the number of freight cars in a railroad freight train to 70 cars, and limiting the number of cars in a railroad passenger train to 14 or 16, and that compliance by railroads subject to the Interstate Commerce Act with such rules, regulations, practices, and laws, during the present emergency, may result in congestion of tracks and terminals, wasteful use of locomotives, and interference with the free flow of traffic necessary in the present emergency; and that railroad freight trains exceeding one-half mile in length, or exceeding 70 cars in length, and railroad passenger

trains exceeding 14 or 16 cars in length may be operated in accordance with safety standards now applicable, during the present emergency, in and through such States, and that such operation will facilitate the free flow of traffic necessary during the present emergency;

Therefore, it is ordered, That:

Title 49—Transportation and Railroads.

Chapter I—Interstate Commerce Commission.

Subchapter A—General Rules and Regulations:

Part 95—Car Service

See.

95.1 Length of trains.

95.2 Effective period; emergency character.

Authority: §§ 95.1 and 95.2, issued under authority of 40 Stat. 101, 41 Stat. 476, 49 Stat. 543, 54 Stat. 901; 49 U. S. C. 1 (10)–(17).

§ 95.1. *Length of trains.*—From and after September 15, 1942, carriers by railroad subject to the Interstate Commerce Act shall operate their trains, when necessary for the prompt movement of freight and the clearing or avoidance of congestion by either freight or passenger trains, without regard to any rules, regulations, practices, or laws now in effect and being enforced in the various States limiting the length of freight trains to not more than one-half mile, and limiting the number of cars in a railroad freight train to 70 cars, or limiting the number of cars in a railroad passenger train to 14 or 16.

§ 95.2. *Effective period; emergency character.*—This order shall remain in effect during the war

in which the United States is now engaged, unless sooner terminated by subsequent order of the Commission; and that this order, being based upon conditions of war emergency, shall not constitute a precedent for peace-time operations.

It is further ordered, That this order shall be served upon each common carrier by railroad subject to the Interstate Commerce Act and upon each State railroad commission, and that notice of this order be given to the general public by depositing a copy thereof in the office of the Secretary of the Commission at Washington, D. C., and by filing it with the Director of the Division of the Federal Register, The National Archives.

By the Commission, division 3.

[SEAL] W. P. BARTEL,
Secretary.

APPENDIX D

Disposition of the 164 Train-Length Bills Introduced in 36 State Legislatures Since 1920.

A. STATUTES PASSED

1. La., 5 La. Gen. Stat. (Dart, 1939) sec. 8150.1–8150.10.
2. Nev., 3 Nevada Compiled Laws (Hillyer, 1929; 1938 Pocket Part), sec. 6357.01–6357.04.
3. Okla., 66 Okla. Stat. (1941) sec. 102.

B. BILLS NEVER REPORTED OUT OF COMMITTEE

1. Colo., H. B. 141, Colo. House Journ. 1929, p. 1054.
2. S. B. 368, Colo. Sen. Journ. 1937, p. 245.
3. S. B. 399, Colo. Sen. Journ. 1941, p. 158.
4. Idaho, H. B. 300, Ida. House Journ. 1933, p. 404.
5. Ill., H. B. 450, Ill. House Journ. 1929, p. 1173.
6. H. B. 276, Ill. House Journ. 1931, p. 1503.
7. H. B. 707, Ill. House Journ. 1931, p. 1503.
8. Kans., S. B. 336, Kans. Sen. Journ. 1939, p. 266.
9. Ky., S. B. 54, Ky. Sen. Journ. 1930, p. 110.
10. H. B. 134, Ky. House Journ. 1932, p. 111.

11. S. B. 122, Ky. Sen. Journ. 1934, p. 269.
12. S. B. 78, Ky. Sen. Journ. 1940, p. 754.
13. H. B. 217, Ky. House Journ. 1940, p. 4181.
14. Md., S. B. 168, Md. Sen. Journ. 1935, p. 191.
15. H. B. 614, Md. House Journ. 1937, p. 1082.
16. S. B. 199, Md. Sen. Journ. 1941, p. 168.
17. Mich., H. B. 251, Mich. House Journ. 1935, p. 335.
18. H. B. 163, Mich. House Journ. 1937, p. 209.
19. Minn., H. File 571, Minn. House Journ. 1929, p. 332.
20. H. File 270, Minn. House Journ. 1939, p. 136.
21. Miss., S. B. 457, Miss. Sen. Journ., 1936, p. 335.
22. Neb., S. File 172, Neb. Sen. Journ. 1929, p. 1326.
23. N. J., Assembly Bill 515, N. J. Minutes of the Assembly, 1924, p. 190.
24. Assembly Bill 113, N. J. Minutes of the Assembly, 1925, p. 372.
25. Assembly Bill 268, N. J. Minutes of the Assembly, 1927, p. 455.
26. Assembly Bill 162, N. J. Minutes of the Assembly, 1927, p. 455.
27. Senate Bill 117, N. J. Senate Journ. 1933, p. 141.
28. Assembly Bill 148, N. J. Minutes of the Assembly, 1933, p. 568.
29. Senate Bill 75, N. J. Senate Journ. 1934, p. 137.

30. Assembly Bill 133, N. J. Minutes of the Assembly, 1938, p. 163.
31. Assembly Bill 94, N. J. Minutes of the Assembly, 1939, p. 118.
32. Assembly Bill 140, N. J. Minutes of the Assembly, 1940, p. 172.
33. N. Y., Assembly Int. 1035, Print 1151, N. Y. Assembly Journ. 1920, p. 566.
34. Ohio, H. B. 463, Ohio House Journ. 1931, p. 267.
35. H. B. 466, Ohio House Journ. 1933, p. 332.
36. S. B. 10, Ohio Senate Journ. 1933, p. 28.
37. H. B. 428, Ohio House Journ. 1935, p. 355.
38. H. B. 373, Ohio House Journ. 1935, p. 336.
39. H. B. 97, Ohio House Journ. 1937, p. 130.
40. S. B. 22, Ohio Senate Journ. 1937, p. 52.
41. Pa., H. B. 215, Pa. Legislative Journal—House, 1923, p. 172.
42. H. B. 616, Pa. Legislative Journal—House, 1925, p. 255.
43. H. B. 1702, Pa. Legislative Journal—House, 1929, p. 1514.
44. H. B. 1322, Pa. Legislative Journal—House, 1931, p. 1296.
45. H. B. 737, Pa. Legislative Journal—House, 1933, p. 2944.
46. S. B. 32, Pa. Legislative Journal (Extraordinary Session) 1933, p. 117.
47. H. B. 59, Pa. Legislative Journal (Extraordinary Session) 1933, p. 493.
48. S. B. 194, Pa. Legislative Journal 1935, p. 308.

49. S. B. 204, Pa. Legislative Journal 1937, p. 401.
50. H. B. 1107, Pa. Legislative Journal 1939, p. 1160.
51. R. I., H. B. 866, R. I. House Journal, April 20, 1933, p. 31.
52. H. B. 687, R. I. House Journal, April 30, 1936, p. 34.
53. Texas, H. B. 605, Texas House Journal, 1941, p. 761.
54. S. B. 195, Texas Senate Journal, 1941, p. 342.
55. Va., H. B. 246, Va. House Journ. 1936, p. 201.
56. Wash., S. B. 270, Wash. Sen. Journ. 1933, p. 566.
57. W. Va., S. B. 43, W. Va. Sen. Journ. 1933, p. 58.
58. S. B. 16, W. Va. Sen. Journ. 1935, p. 34.
59. S. B. 96, W. Va. Sen. Journ. 1935, p. 144.
60. H. B. 142, W. Va. Journ. of House of Delegates. 1937, p. 615.
61. S. B. 89, W. Va. Senate Journ. 1937, p. 121.
62. H. B. 110, W. Va. Journ. of House of Delegates, p. 161.

C. BILLS WITHDRAWN BY THEIR SPONSORS

1. Fla., H. B. 672, Fla. House Journ. 1925, p. 1523, after unfavorable committee report, p. 1294.
2. La., H. B. 210, La. H. of R. Official Calendar, 1936, p. 113, after favorable committee report.

3. Minn., Sen. File 363, Minn. Sen. Journ., 1927, p. 728 (before committee had acted).
4. Wis., Assembly Bill 661, Wis. House Journal, 1931, p. 1374 (before committee had acted).

D. BILLS REPORTED UNFAVORABLY BY LEGISLATIVE COMMITTEES, WITH RESPECT TO WHICH NO FURTHER ACTION WAS TAKEN

1. Ark., H. B. 418, Ark. House Journ. 1931, p. 794.
2. Calif., S. B. 113, Calif. Sen. Journ. 1927, p. 2342.
3. S. B. 213, Calif. Sen. Journ. 1927, p. 2342.
4. Colo., S. B. 359, Colo. Sen. Journ. 1923, p. 1270.
5. H. B. 288, Colo. House Journ. 1925, p. 1317.
6. H. B. 774, Colo. House Journ. 1937, p. 1739.
7. Kans., H. B. 584, Kans. House Journ. 1921, p. 454.
8. H. B. 255, Kans. House Journ. 1923, p. 226.
9. H. J. R. 5, Kans. House Journ. 1925, p. 235.
10. S. J. R. 5, Kans. Sen. Journ. 1925, p. 212.
11. Ky., S. B. 99, Ky. Sen. Journ. 1938, p. 1537.
12. Miss., H. B. 116, Miss. House Journ. 1940, p. 579.
13. Mo., H. B. 70, Mo. House Journ. 1923, p. 397.
14. H. B. 897, Mo. House Journ. 1929, p. 1287.

15. Mont., H. B. 44, Mont. House Journ. 1921, p. 273.
16. Neb., H. Roll 113, Neb. House Journ. 1923, p. 405.
17. H. Roll 298, Neb. House Journ. 1931, p. 625.
18. Sen. File 57, Neb. Sen. Journ. 1933, p. 666.
19. Tenn., H. B. 837, Tenn. House Journ. 1925, p. 787.
20. Texas, H. B. 138, Texas House Journ. 1923, p. 535.
21. Utah, H. B. 143, Utah House Journ. 1931, p. 395.

E. BILLS REPORTED WITHOUT RECOMMENDATION BY LEGISLATIVE COMMITTEE, WITHOUT FURTHER ACTION BEING TAKEN

1. Ark., H. B. 299, Ark. House Journ. 1933, p. 923.
2. Calif., Assembly Bill 235, Calif. Journ. of the Assembly, 1925, p. 2597.
3. Assembly Bill 290, Calif. Journ. of the Assembly, 1929, p. 2897.
4. Assembly Bill 481, Calif. Journ. of the Assembly, 1931, p. 3931.
5. Assembly Bill 1276, Calif. Journ. of the Assembly, 1931, p. 3931.
6. Assembly Bill 2363, Calif. Journ. of the Assembly, 1933, p. 2363.
7. Kansas, S. B. 274, Kans. Senate Journ. 1923, p. 329.
8. Ky., H. B. 47, Ky. House Journ. 1930, p. 978.

After having passed one house:

9. Calif., Assembly Bill 71, Calif. Journ. of the Assembly, 1937, p. 3864.

F. DIED ON THE LEGISLATIVE CALENDAR AFTER PRELIMINARY CONSIDERATION

1. Fla., S. B. 488, Fla. Sen. Journ. 1939, p. 587.
2. Ida., S. B. 162, Ida. Sen. Journ. 1935, p. 349.
3. Ill., H. B. 80, Ill. House Journ. 1923, p. 1270.
4. Ill., H. B. 57, Ill. House Journ, 1925, p. 970.
5. Iowa, H. File 386, Iowa House Journ. 1933, p. 887.
6. S. File 299, Iowa Sen. Journ. 1933, p. 667.
7. S. File 43, Iowa Sen. Journ. 1935, p. 963.
8. H. File 62, Iowa House Journ, 1935, p. 1070.
9. Ky., H. B. 47, Ky. House Journ. 1930, p. 1117.
10. H. B. 167, Ky. House Journ. 1936, p. 2105.
11. H. B. 168, Ky. House Journ. 1938, p. 3018.
12. Miss., H. B 385, Miss. House Journ. 1936, p. 388.
13. Mo., H. B. 81, Mo. House Journ. 1933, p. 922.
14. N. J., Assembly B. 90, N. J. Minutes of the Assembly, 1937, p. 531.
15. Ohio S. B. 22, Ohio Senate Journal, 1931, p. 319.
16. S. B. 29, Ohio Senate Journal, 1935, p. 285.
17. Texas, S. B. 173, Texas Senate Journal, 1937, p. 986.
18. H. B. 425, Texas House Journal, 1939, p. 3911.

19. Wash., S. B. 80, Wash. Senate Journ. 1935, p. 258.
20. W. Va., H. B. 241, W. Va. Journ. of House of Delegates, 1935, p. 1261.

After having passed one house;

21. Colo., S. B. 497, Colo. Sen. Journ. 1935, p. 348, Sen. Journ. 1935, p. 499.
22. H. B. 467, Colo. House Journ. 1935, p. 877, Sen. Journ. 1935, p. 978.

G. PASSED ONE HOUSE BUT NOT REPORTED OUT OF COMMITTEE IN THE SECOND

1. Nev., Assembly Bill 2, Nev. Assembly Journ. 1935, p. 34, Senate Journ. p. 111.
2. Pa., H. B. 311, Pa. Legislative Journ. 1935, pp. 356, 5074.
3. H. B. 75, Pa. Legislative Journ. 1937, p. 2394.
4. Wash., H. B. 333, Wash. House Journ. 1937, p. 412, Sen. Journ. p. 658.

H. DEFEATED BY VOTE ON LEGISLATIVE FLOOR

(This includes votes on whether the bill should pass, on whether to uphold a committee report rejecting a bill, and on whether to table or indefinitely postpone a bill.)

1. Calif., S. B. 136, Calif. Sen. Journ. 1925, p. 1614.
2. Assembly B. 17, Calif. Journ. of the Assembly, 1935, p. 4811.
3. Colo., H. B. 203, Colo. House Journ. 1931, p. 939.
4. Conn., S. B. 23, Conn. Sen. Journ. 1933, p. 1846, House Journ. 1933, p. 1903.
5. H. B. 343, Conn. House Journ. 1937, p. 1467.

6. Idaho, H. B. 116, Ida. House Journ. 1937, p. 555.
7. Illinois, S. B. 299, Ill. Senate Journ. 1923, p. 915.
8. Indiana, S. B. 95, Ind. Senate Journ. 1929, p. 761.
9. H. B. 203, Ind. House Journ. 1931, p. 496.
10. H. B. 119, Ind. House Journ. 1933, p. 725.
11. H. B. 171, Ind. House Journ. 1935, p. 1044.
12. Ky., H. B. 257, Ky. House Journ. 1934, p. 1776.
13. Md., H. B. 56, Md. House Journ. 1937, p. 725.
14. Minn., H. File 207, Minn. House Journ. 1935, p. 1083.
15. Mont., S. B. 3, Mont. Sen. Journ. 1935, p. 221.
16. H. B. 376, Mont. House Journ. 1935, p. 716.
17. N. H., H. B. 193, N. H. House Journ. 1937, p. 268.
18. Oregon, S. B. 161, Ore. Senate and House Journals, 1931, p. 110.
19. H. B. 207, Ore. Senate and House Journals, 1935, p. 455.
20. Texas, H. B. 368, Texas House Journal, 1933, p. 2299.
21. Utah, H. B. 37, Utah House Journal, 1933, p. 564.
22. S. B. 18, Utah Senate Journal, 1937, p. 424.
23. W. Va., H. B. 148, W. Va. Journ. of House of Delegates, 1933, p. 531.
24. Wis., S. B. 129, Wis. Senate Journal, 1925, p. 692.

25. S. B. 70, Wis. Senate Journal, 1923, p. 519.

After having passed one house:

26. Minn., H. File 141, Minn. House Journ. p. 738, Senate Journ. 1937, p. 957.
27. Mont., H. B. 13, Mont. House Journ. 1937, p. 113, Sen. Journ. p. 209.
28. Texas, H. B. 347, Texas House Journal, 1937, p. 848, Sen. Journ. p. 2214.
29. Utah, H. B. 63, Utah House Journal, 1935, p. 315, Sen. Journ. p. 660.

I. VETOED

1. Calif., S. B. 24, Calif. Sen. Journ. 1935, p. 1296.

J. NEW MEXICO: BILLS INTRODUCED BUT NOT PASSED

We have been unable to ascertain the disposition of these bills apart from the fact that they did not pass.

1. House Bill No. 8, 1923.
2. House Bill No. 265, 1923.
3. House Bill No. 169, 1927.
4. House Bill No. 347, 1929.
5. House Bill No. 33, 1931.
6. House Bill No. 23, 1933.
7. House Bill No. 92, 1937.
8. House Joint Memorial No. 2, 1937.
9. House Bill No. 55, 1939.

MEMORIALS TO CONGRESS

1. Calif., Assembly J. R. 31, Statutes & Amendments to the Codes, 1937, c. 60, p. 2816.
2. Calif., Assembly J. R. 13, Statutes & Amendments to the Codes, 1939, p. 3217.
3. Nevada, Statutes 1935, p. 431.

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